Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

METRO FUEL L.L.C.,

Petitioner,

– v. –

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment permits a municipality to impose severe restrictions on the placement of advertising signs on private property when, in order to generate revenue, the municipality has auctioned off to the highest bidder the right to blanket its sidewalks with thousands of advertising signs, virtually all of which violate the advertising sign restrictions that apply to private property?

2. Whether this Court's fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), constitutes binding precedent for any First Amendment principle, and, if so, whether *Metromedia* established that outdoor advertising restrictions are not subject to the significant scrutiny that this Court has applied to other media in subsequent commercial speech cases?

3. What quantum of evidence, if any, must a municipality proffer in order to meet its burden of justifying its decision to exempt its revenue-generating licensees from the advertising sign restrictions that apply to everyone else?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Metro Fuel L.L.C. states that it is a wholly-owned subsidiary of Fuel Outdoor Holdings L.L.C. No publicly traded company owns more than ten percent of the stock of Metro Fuel L.L.C.

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INTRODUCTION

Nearly thirty years ago, this Court decided *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a notoriously fractured decision that failed to yield a majority opinion and has bedeviled the lower courts ever since. Indeed, the web of competing and inconsistent views espoused by the five opinions in *Metromedia* is so perplexing that then-Justice Rehnquist lamented the "genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (Rehnquist, J., dissenting). Thirteen years later, then-Judge Alito echoed that sentiment, noting the doctrinal morass that *Metromedia* created, and expressing the hope that this Court would someday "provide[ ] further guidance concerning the constitutionality of sign laws." *Rappa v. New Castle County*, 18 F.3d 1043, 1080 (3d Cir. 1994) (Alito, J., concurring). Such guidance is long overdue. This case implicates two distinct circuit conflicts emanating from *Metromedia* and presents an ideal vehicle for resolving them.

Petitioner challenges the constitutionality of New York City's regulation of so-called "panel" advertising signs – small-format, poster-style ads that have become ubiquitous in, among many other places, bus stop shelters throughout the country. With only minor exceptions, New York City law purports to prohibit the placement of panel signs on private property anywhere in the City, ostensibly in order to safeguard "aesthetics" and "neighborhood character." Notwithstanding these restrictions, however, the City has entered into massive revenue-sharing contracts with various private advertising

companies, authorizing them to place tens of thousands of panel advertising signs on bus shelters, newsstands, and public telephones throughout the City in exchange for well over $1 billion in guaranteed cash payments. Virtually every one of these signs violates the very advertising sign restrictions that apply on private property just a few feet away, but the City ignores these restrictions so that it can collect the lucrative payments. The question in this case boils down to whether the First Amendment tolerates such glaring and unabashed underinclusiveness.

Since *Metromedia*, this Court has struck down a number of underinclusive commercial speech restrictions that were "pierced by exemptions and inconsistencies" that fatally undermined their purported rationale. *See Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 189-190, 195 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 425 (1993). As the Court has explained, underinclusiveness – the tolerance of speech that should be as much of a concern as that which is prohibited – is problematic because it "diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation omitted).

In rejecting petitioner's First Amendment challenge, the Second Circuit gave short shrift to this Court's well-established commercial speech underinclusiveness jurisprudence, believing that its hands were tied by *Metromedia*. That view was rooted in the following two sentences in the *Metromedia* plurality opinion: "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method. We deal here with the law of billboards." 453 U.S. at 501 (plurality opinion) (quotations omitted). The Second Circuit read this language to mean that it was not bound by this Court's post-*Metromedia* underinclusiveness cases because, when it comes to "the law of billboards," *Metromedia* "is controlling." App. A-19, A-24; *see also* App. B-32, B-38 (district court opinion holding that *Metromedia* "is the flag-bearer for billboard-regulation cases" and "makes clear" that "the law of billboard regulation is distinct from other speech regulation").

In doing so, the Second Circuit deepened an already pronounced circuit conflict regarding whether *Metromedia* establishes any binding precedent. The federal courts of appeals are in open disagreement over what, if anything, *Metromedia* means, with some courts holding that *Metromedia* establishes no binding law at all, and other courts (like the court below) holding that *Metromedia* not only establishes binding law but gives governments virtual *carte blanche* to restrict commercial advertising signs selectively.

In addition, the decision below implicates a second, entirely distinct circuit conflict regarding the quantum of evidence that the government must adduce in order to meet its burden of justifying the restriction of commercial speech. The record in this case is devoid of *any* evidence justifying the City's differential treatment of petitioner's signs and the identical signs of its revenue-generating licensees. The Second Circuit was not troubled by this dearth of evidence, choosing to "defer to the City's judgment in controlling the placement of outdoor advertising" because "[i]t is not this Court's role to second guess the City's urban planning decisions." App. A-17, A-23. This remarkable degree of deference stands in sharp contrast to the decisions of numerous other courts of appeals that have required the government to make a significant showing, supported by concrete evidence, justifying the suppression of commercial speech. This conflict warrants this Court's attention as well.

If New York City's scheme is constitutional, then something is seriously awry in this Court's commercial speech jurisprudence. Last term, this Court held that the government may selectively allow one private party to erect a monument in a public park but prohibit others from erecting their own monuments on the government's land. *Pleasant Grove City v. Summum*, 555 U.S. __, 129 S. Ct. 1125 (2009). Now imagine that the government purported to prohibit private parties from erecting monuments on their *own* land adjacent to a park – ostensibly to protect the park's "aesthetics" and "character" – but auctioned off to the highest bidder the exclusive right to erect monuments that would have the same

negative aesthetic impact. That is exactly what New York City has done here, as have the scores of other municipalities across the country (including Philadelphia, Miami, Detroit, Atlanta, Houston, Denver, Los Angeles, San Francisco, and Phoenix, to name a few) that have entered into large-scale revenue-sharing bus shelter advertising contracts.

Petitioner now respectfully asks this Court to dispel the widespread confusion into which *Metromedia* has plunged the lower courts, and to clarify that the selective and underinclusive ban on commercial advertising signs at issue violates core First Amendment principles.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 594 F.3d 94 and reprinted in the Appendix at App. A-1 to A-36. The opinion of the district court is reported at 608 F. Supp. 2d 477 and is reprinted at App. B-1 to B-77.

JURISDICTION

The Second Circuit issued its opinion on February 3, 2010. On April 21, 2010, Justice Ginsburg granted petitioner's application to extend the time within which to petition for certiorari until July 6, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The New York City Zoning Resolution (the "Zoning Resolution" or "Z.R.") distinguishes between "advertising" signs and "accessory" signs. An "advertising" sign (also known as an "off-site" sign) is

"a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot." An "accessory" sign (also known as an "on-site" sign), in contrast, is one that directs attention to a business that is conducted on the premises where the sign is located.

The Zoning Resolution liberally permits on-site signs to be maintained anywhere in commercial and manufacturing districts, subject only to size, height, illumination, and projection limitations. Z.R. §§ 32-62 to 32-661, 42-52, 42-543. Contrary to its treatment of on-site signs, the Zoning Resolution places severe restrictions on the placement of off-site signs in commercial and manufacturing districts. Whereas on-site signs may be located in any type of district, off-site signs are permitted only in special entertainment districts (such as Times Square and Coney Island) and, subject to stringent illumination restrictions, in manufacturing and automobile services districts. Z.R. §§ 32-63, 42-52. Off-site signs are completely prohibited in residential districts. Z.R.§ 22-32.[1]

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[1] The relevant excerpts of the Zoning Resolution are reprinted at App. C-1 to C-10. The full text of the Zoning Resolution is available at http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Metro Fuel LLC is a small outdoor advertising company doing business in several cities, including in New York City. Petitioner operates so-called "panel" signs, which are illuminated, poster-style advertising signs measuring approximately four feet by six feet. Petitioner displays these panel signs on private property (principally in parking lots or garages in close proximity to and in view of the sidewalk) that it leases for that purpose. Until the City's voluntary stay of enforcement dissolved following the Second Circuit's decision below, petitioner operated approximately 440 panel signs in New York City.

The vast majority of petitioner's panel signs are prohibited by the New York City Zoning Resolution. The Zoning Resolution prohibits advertising signs in all residential districts and virtually all commercial districts (other than special entertainment districts such as Times Square and Coney Island). Z.R. §§ 22-32, 32-63, 42-52. The Zoning Resolution permits advertising signs in manufacturing districts, but only if they are not illuminated. Approximately 7% of petitioner's panel signs are located in permissible districts, and the remaining 93% are located in districts in which panel signs are prohibited.

Notwithstanding these restrictions on panel signs on private property, the City has entered into franchise agreements authorizing private companies to place thousands of illuminated panel advertising signs on sidewalks throughout the City. In 2006, the City entered into a 20-year franchise agreement with

Cemusa, Inc. ("Cemusa") requiring Cemusa to rebuild all of the City's bus shelters and newsstands and permitting Cemusa to place panel advertising signs on each and every one of them. The City entered into similar franchise agreements permitting a number of other private companies to place advertising signs on public telephones. All told, the City has authorized its private licensees to place approximately 20,000 advertising signs on sidewalk structures in residential, commercial, and manufacturing districts throughout the City. Virtually all of these advertising signs violate the very Zoning Resolution provisions that the City seeks to enforce against petitioner.

The City has profited handsomely from its willingness to allow private companies to place advertising signs on its sidewalk structures. In addition to financing the cost of building and maintaining new bus shelters and newsstands, Cemusa is obligated to pay the City half of the gross advertising revenue that its panel signs generate, and has guaranteed the City a minimum of $1 billion in cash (plus another $400 million in "in kind" benefits) over the twenty-year contract term. The City reaps an additional $14 million per year from its public telephone advertising sign contracts.

The City claims that the Zoning Resolution's restrictions on panel advertising signs are necessary to protect "aesthetics" and "neighborhood character." It is plain, however, that the many thousands of panel advertising signs that the City has allowed to be placed on its sidewalks implicate aesthetic and neighborhood character concerns at least as much as petitioner's signs do. It is undisputed that the City's

panel signs are at least as large and bright as petitioner's signs and that, due to their placement on the sidewalks, the City's signs are even more visible to passing pedestrians and motorists. Moreover, whereas petitioner's signs display only static printed advertising copy, many of the City's panel signs contain scrolling and/or electronic advertising copy – including dozens of high-definition video advertising signs – which the City has labeled the "wave of the future."

Photographs of typical examples of petitioner's signs and the City's bus shelter signs (which are part of the record in this case) appear at App. D-2 to D-3 (petitioner's signs) and App. D-4 to D-7 (the City's licensees' signs).

Prior to authorizing the street furniture advertising franchise, the New York City Planning Commission engaged in a land use impact study. The Commission's final report concluded that the proposed advertising program would have a considerable adverse impact on aesthetics and neighborhood character, stating that the Commission "share[d] [the] concern" that "was expressed during the public review process that the [proposal] allows too much advertising on Franchise structures." The Commission nonetheless approved the plan, concluding that tolerating "revenue-generating advertising" was necessary to induce a franchisee to finance the cost of building the new bus shelters and newsstands that the City desired.

During the subsequent bidding process, the City chose Cemusa – whose street furniture design the City found to be by far the *least* attractive – because

Cemusa's financial proposal guaranteed the City by far the most revenue of any of the other bidders. The City convened a "Design Advisory Committee" (*comprised of representatives of City agencies and* civic organizations with experience in architecture and urban design) to evaluate each of the street furniture design proposals. The Design Advisory Committee specifically recommended *rejecting* Cemusa's proposal, finding that from a design perspective, Cemusa was "a poor choice." The Committee concluded that the designs proposed by two of the other bidders (NBC/Decaux and Van Wagner) were rated "*significantly* higher" than Cemusa (emphasis in original). The Committee "felt strongly that NBC/Decaux's proposal . . . was by far the strongest," that Van Wagner's was "a close second," and that those were "the only two acceptable options."

Despite Cemusa's inferior design scores, Cemusa was willing to guarantee the City far more advertising revenue ($1 billion over twenty years) than its competitors. Accordingly, the City rejected the Design Advisory Committee's recommendation and awarded the franchise to Cemusa. As one City official affirmed under oath in a different proceeding, it was "the compensation promised to the City in its proposal [that] put Cemusa ahead of the other proposers."

B. Proceedings Below

Petitioner commenced this action in the Southern District of New York in September 2007, asserting that the First Amendment prohibits the City from enforcing against petitioner advertising sign restrictions that it does not enforce against its

revenue-generating licensees. Petitioner informed the City that it intended to move for a preliminary injunction, and the City agreed to stay enforcement of the restrictions at issue during the pendency of the district court proceedings.

During discovery, the City steadfastly denied that it entered into the street furniture advertising contracts in order to generate revenue. Instead, the City insisted that its goal was merely to induce a private company to build attractive new bus shelters and newsstands at no cost to the City – notwithstanding the undisputed fact that Cemusa had by far the lowest design scores, but guaranteed by far the most revenue, of any of the bidders.

The parties then cross-moved for summary judgment. Because it is undisputed that petitioner's panel signs are in all material respects identical to those of the City's franchisees – they are the same size, the same brightness, and often contain the very same advertising copy – the City faced the formidable burden of justifying its markedly differential treatment of essentially identical signage.

In attempting to meet this burden, the City did not proffer *any* evidence explaining its policymakers' decision to prohibit petitioner's signs but permit its revenue-generating licensees' identical signs. Instead, the City relied exclusively on its urban design "expert," Douglas Woodward. Mr. Woodward opined that panel advertising signs harm aesthetics and neighborhood character when they are placed on private property, but that street furniture advertising signs are, by virtue of their placement on

the sidewalk, inherently incapable of adversely impacting aesthetics or neighborhood character. Mr. Woodward therefore concluded that *none* of the thousands of street furniture advertising signs in New York City adversely affects aesthetics or neighborhood character – not even high-definition video ads, ads near parks, ads in purely residential neighborhoods, ads in historic districts, or ads placed in front of landmark buildings – but that *all* of petitioner's otherwise identical signs do.

It is undisputed that Mr. Woodward's urban design "theory" was conceived after the fact, and that it had nothing whatsoever to do with the City's *actual* reasons for exempting its street furniture signs from its advertising sign restrictions. Indeed, it is undisputed that the City's actual decisionmakers *disagreed* with Mr. Woodward's *post hoc* rationalization. The City's actual decisionmakers "share[d] [the] concern" that there was "too much advertising on Franchise structures" but concluded that it was necessary to tolerate "revenue-generating advertising."[2]

The district court granted summary judgment in favor of the City. It concluded that it was bound by *Metromedia* – and not by subsequent commercial

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[2] Mr. Woodward has never written a word on the subject of urban design, and his "theory" is entirely novel. It is undisputed that no urban design academic or practitioner has *ever* suggested that it makes sense for a municipality to exempt bus shelters, newsstands, and public telephones from otherwise applicable advertising sign restrictions. Mr. Woodward even exaggerated his credentials (claiming falsely on his *curriculum vitae* that he has a "degree" in urban design; he subsequently admitted during his deposition that he does not).

speech cases such as *Greater New Orleans*, *Rubin*, and *Discovery Network* – because *Metromedia* "is the flag-bearer for billboard-regulation cases" and "makes clear" that "the law of billboard regulation is distinct from other speech regulation." App. B-32, B-38. The district court gave Mr. Woodward's novel urban design theory the most tepid of endorsements, concluding that he was "not wrong," and that Mr. Woodward's opinion that it is appropriate to treat otherwise identical signage on sidewalks and parking lots differently was "not fanciful." App. B-67. As the district court put it: "Streets and buildings are different; accordingly, different standards may be imposed." App. B-70. Acknowledging that the City had not offered any actual evidence supporting this differential treatment, the district court concluded that "[n]o study is required to prove what the eye can readily detect." App. B-71.

The City agreed to continue the stay of enforcement during the pendency of petitioner's appeal.

The Second Circuit affirmed. Like the district court, the Second Circuit concluded that it was not bound by post-*Metromedia* commercial speech cases because "[e]ach method of communicating ideas is a law unto itself" and when it comes to "the law of billboards," *Metromedia* "is controlling." App, A-29, A-24. And like the district court, the Second Circuit was not concerned that the City proffered no evidence supporting its naked assertion that its street furniture advertising signs are different from petitioner's signs. The Second Circuit chose to "defer to the City's judgment in controlling the placement of outdoor advertising" because "[i]t is not this Court's

role to second guess the City's urban planning decisions." App. A-17, A-23.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CIRCUIT CONFLICT REGARDING THE PRECEDENTIAL EFFECT, IF ANY, OF *METROMEDIA*, AND CLARIFY THE MEANING OF *METROMEDIA* IN LIGHT OF SUBSEQUENT COMMERCIAL SPEECH UNDERINCLUSIVENESS CASES

This Court should grant certiorari to resolve pervasive uncertainty over the meaning and scope of its splintered decision in *Metromedia*, and to clarify that outdoor advertising sign regulations are not immune from the close scrutiny that this Court has repeatedly applied, in the nearly thirty years since *Metromedia* was decided, to underinclusive commercial speech restrictions.

The Second Circuit held unequivocally that *Metromedia* "is controlling," App. A-19, and refused to apply any of this Court's post-*Metromedia* cases holding that restrictions on commercial speech violate the First Amendment when they are "pierced by exceptions and inconsistencies" that substantially undermine their purported rationale. *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 189-190, 195 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 425 (1993). By holding that *Metromedia* forecloses petitioner's First Amendment challenge as a matter of law, the Second Circuit erred, and deepened a

festering circuit conflict over the binding effect, if any, and meaning of that case.

As an initial matter, it is important to underscore a point not disputed in this litigation because it has been settled for at least a generation: commercial advertising signs are a form of speech protected by the First Amendment. While some early precedents of this Court suggested that commercial speech is not entitled to First Amendment protection, *see, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), this Court decisively repudiated that view in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-70 (1976). Since then, this Court has applied a balancing test to analyze the constitutionality of governmental restrictions on commercial speech, considering [1] whether the speech is "lawful" and "not ... misleading," [2] whether the asserted governmental interest is "substantial," [3] whether the regulation "directly advances the governmental interest asserted," and [4] "whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

In *Metromedia*, this Court addressed a First Amendment challenge to a San Diego ordinance that generally prohibited both commercial and noncommercial signs throughout the city, but exempted on-site commercial signs. *See* 453 U.S. at 493-94 & nn.1, 2. This Court reversed the judgment of the California Supreme Court and struck down the entire ordinance as "unconstitutional on its face" under the First Amendment, *see id.* at 521 & n.26, but was unable to produce a majority opinion.

Rather, *Metromedia* spawned five separate opinions. A plurality (White, J., joined by Stewart, Marshall, and Powell, JJ.) concluded that the ordinance was invalid as applied to noncommercial signs, but valid as applied to off-site commercial signs notwithstanding the exemption for onsite commercial signs. *See id.* at 498-521. Justice Brennan, joined by Justice Blackmun, concurred in the judgment invalidating the ordinance, but concluded that the ordinance was invalid as applied to both noncommercial and commercial signs. *See id.* at 521-40. Justice Stevens, Chief Justice Burger, and then-Justice Rehnquist each dissented on the ground that the ordinance was valid as applied to both commercial and noncommercial signs. *See id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting). Then-Justice Rehnquist expressed his discontent that "[i]n a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (dissenting opinion).

Justice Rehnquist's concern has proved prophetic, for the lower courts have struggled in vain to determine what lesson, if any, to derive from *Metromedia*. The Third, Sixth, and Eleventh Circuits have responded to this uncertainty by holding that *Metromedia* establishes no binding law at all because it did not yield a majority opinion or any ascertainable legal principle. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261 (11th

Cir. 2005) ("Because the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application."); *id.* at 1261 n.10 ("[T]here may be situations where [a fractured decision] does not yield any rule to be treated as binding in future cases. *Metromedia* presents just such a case.") (citations omitted); *Rappa v. New Castle County*, 18 F.3d 1043, 1054-61 (3d Cir. 1994) (holding that "*Metromedia* is . . . a case" in which "no particular standard constitutes the law of the land, because no single approach can be said to the support of a majority of the Court"); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991) (noting that "[t]he [*Metromedia*] Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech," and declining to interpret *Metromedia* as establishing binding law with respect to restrictions on commercial speech), *aff'd*, 507 U.S. 410. Indeed, the Third Circuit in *Rappa* proceeded to craft its own First Amendment advertising sign analysis from scratch, which then-Judge Alito found appropriate "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws." 18 F.3d at 1080 (Alito, J., concurring).

In sharp contrast, however, other lower courts – including the Fourth, Eighth, Ninth, and Tenth Circuits, and now the Second as well – have held that *Metromedia* establishes binding law, and have interpreted that decision to give governments virtual *carte blanche* to restrict off-site commercial advertising signs. *See Metro Lights, L.L.C. v. City of*

Los Angeles, 551 F.3d 898, 911 (9th Cir. 2009) (declining to address whether "*Metromedia* is inconsistent with cases like *Discovery Network*" because "we are bound to follow the Supreme Court precedent most directly on point" and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions") (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (relying on *Metromedia* to uphold "restrictions on off premises commercial signs"); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990) (applying *Metromedia* to reject underinclusivity challenge to commercial billboard regulations); *Georgia Outdoor Adver., Inc. v. City of Waynesville*, 833 F.2d 43, 45 (4th Cir. 1987) (relying on *Metromedia* to reject a challenge to a complete ban on commercial billboards); *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court . . . determined in *Metromedia* . . . that a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons.").

Thus, the courts of appeals are divided on the threshold question whether *Metromedia* establishes any binding law in the first place. This situation leaves governmental regulators and regulated entities (many of which, like petitioner, operate in different circuits) in a fog. The lower courts should not be condemned in perpetuity to trying to ascertain what binding law, if any, the fractured *Metromedia* decision establishes. *Compare Solantic*, 410 F.3d at 1261 & n.10 (analyzing *Metromedia* under the

analysis set forth in *Marks v. United States*, 430 U.S. 188, 193 (1977), and concluding that it establishes no binding law); *Rappa*, 18 F.3d at 1056-61 (same); *Discovery Network*, 946 F.2d at 470 n.9 (same) *with Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 n.14 (7th Cir. 1999) (concluding that *Metromedia* establishes binding law because Justice Stevens, although dissenting from the judgment, joined the discussion regarding commercial signs in the plurality opinion); *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 & n.5 (9th Cir. 1997) (concluding that *Metromedia* establishes binding law because "seven Justices agreed" that the challenged ordinance was not unconstitutionally underinclusive with respect to commercial signs).

Those courts that, like the Second Circuit below, have concluded that *Metromedia* establishes binding law regarding commercial signs have over-read that case. When this Court produces a fractured decision, the binding law, if any, is set forth in "the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment*." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (emphasis added) (citing *Marks*, 430 U.S. at 193); *see also Marks*, 430 U.S. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.") (emphasis added; internal quotation omitted). Because, as noted above, the judgment in *Metromedia* was to reverse the California Supreme Court and invalidate the challenged ordinance in its entirety, the votes of the

dissenting Justices (who would have upheld the ordinance in its entirety) do not establish binding law. That is why, although Justice Stevens joined the plurality's discussion of certain issues, *see* 453 U.S. at 541 (Stevens, J., dissenting in part), there is no opinion for the Court in *Metromedia* either in whole or in part.

In short, under *O'Dell* and *Marks*, the views of the dissenting Justices in *Metromedia* do not give that fractured decision any binding force. That is not to say, of course, that the views of the dissenting Justices in *Metromedia* necessarily lack persuasive force. To the contrary, this Court has looked to the views of the *Metromedia* dissenters in subsequent cases. *See, e.g.*, *Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). But those references do not magically render the views of the dissenting Justices in *Metromedia* binding. To the contrary, the *Ladue* Court confirmed that "the Court's *judgment* in *Metromedia*, supported by two different lines of reasoning [*i.e.*, the plurality opinion and the opinion of Justice Brennan concurring in the judgment], invalidated the San Diego ordinance in its entirety." 512 U.S. at 49 (emphasis added). At the very least, there is no good reason to allow the circuit conflict on *Metromedia*'s binding effect on the lower courts, if any, to continue.

Given the direction that this Court's commercial speech jurisprudence took following *Metromedia*, the question whether *Metromedia* has binding force is no mere technicality. Following *Metromedia*, this Court has held on at least three occasions that a scheme restricting commercial speech violates the third and

fourth *Central Hudson* prongs if it is pierced with exceptions and inconsistencies that substantially undermine its stated objectives.

In *Greater New Orleans*, this Court struck down a federal ban on radio and television advertisements for privately operated commercial casino gambling. The "fundamental" flaw in the regulatory scheme was that it was "so pierced by exemptions and inconsistencies that the Government [could not] hope to exonerate it." 527 U.S. at 190. Whereas broadcasters were barred from carrying any advertising for privately operated casino gambling, advertisements for tribal casino gambling sanctioned by federal law were exempted from the ban, as were various other government-operated commercial casinos. *Id.* The Court emphasized the hypocrisy of the government's patchwork scheme, refusing to "ignore Congress's simultaneous encouragement of tribal casino gambling," which was "growing at a rate exceeding any increase in gambling . . . that private casino advertising could produce." *Id.* at 189. The regulations failed the *Central Hudson* test because they "distinguishe[d] among the indistinct, permitting a variety of speech that pose[d] the same risks the Government purports to fear." *Id.* at 195.

Similarly, in *Rubin*, this Court struck down a federal law prohibiting beer labels from displaying alcohol content, which the government contended was necessary to curtail so-called "strength wars." Applying *Central Hudson*, the Court concluded that the scheme did not directly or materially advance the government's asserted interest because beer manufacturers were permitted to advertise the alcohol content of their beer – just not on the labels

themselves – and because the labeling restriction applied only to beer but not to wine or spirits. 514 U.S. at 488. The Court observed that "[t]he failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars," and that "[i]f combating strength wars were the goal, we would assume that Congress would regulate alcohol content for the strongest beverages as well as for the weakest ones." *Id.* These "exceptions and inconsistencies" were constitutionally fatal because they "undermine[d] and counteract[ed]" the government's proffered justification for regulating. *Id.* at 489.

And in *Discovery Network*, this Court struck down a selective ban on sidewalk newsracks because "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." 507 U.S. at 425.[3]

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[3] Indeed, *Discovery Network* raised the possibility that the *Metromedia* plurality erred in applying *Central Hudson* in the first place. "[I]f commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech." 507 U.S. at 416 n.11. In other words, commercial speech is subject to greater governmental regulation than non-commercial speech only insofar as such regulation relates to the commercial nature of the speech, and not when such regulation has nothing to do with the commercial nature of the speech (*e.g.*, regulations based on aesthetics). *See also id.* at 435-38 (Blackmun, J., concurring); *Discovery Network*, 946 F.2d at 468-

Nothing in *Metromedia* remotely suggests that this underinclusiveness doctrine applies with any less force in the context of outdoor advertising. To the contrary, *Metromedia* expressly reaffirmed that advertising signs are entitled to robust First Amendment protection: "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Id.* at 501 (plurality opinion); *see also id.* at 524 (Brennan, J., concurring) (observing that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive"). As the plurality emphasized, outdoor advertising "is a venerable medium for expressing political, social and commercial ideas," and has "played a prominent role throughout American history, rallying support for political and social causes." *Id.* at 501 (plurality opinion) (quotation omitted).

To be sure, the *Metromedia* plurality would have upheld one particular type of underinclusiveness: San Diego's decision to allow on-site advertising (*i.e.*, a sign for Joe's Diner placed on Joe's Diner) even though it banned off-site advertising (*i.e.*, a sign for American Airlines placed on Joe's Diner). The plurality explained that the rationale behind San Diego's differential treatment of off-site and on-site signage was eminently reasonable:

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72 & n.9, *aff'd*, 507 U.S. 410. Although this Court declined to resolve that issue in *Discovery Network* because the regulations at issue did not pass First Amendment muster even under *Central Hudson*, *see* 507 U.S. at 416 n.11, *Discovery Network* created further doubt about *Metromedia*'s precedential value.

> As we see it, the city could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying a place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.

453 U.S. at 512. In other words, San Diego's interest in enabling the public to identify and locate local businesses was distinct from and stronger than its interest in traffic safety and aesthetics. There thus was nothing at all eyebrow-raising about San Diego's decision to allow on-site signage while simultaneously prohibiting off-site signage.

By sanctioning *that* specific type of underinclusiveness, the *Metromedia* plurality plainly did not suggest that the underinclusiveness doctrine has no application in the outdoor advertising context. To the contrary, the plurality emphasized that every speech-restricting scheme must be independently scrutinized, and that courts must engage in "a particularized inquiry into the nature of the conflicting interests at stake." *Id.* at 503; *see also Discovery Network*, 507 U.S. at 425 n.20 (limiting the applicability of *Metromedia* to the on-site/off-site distinction). Here, the "particularized inquiry" that *Metromedia* requires demonstrates that the City's decision to ignore its rules when it comes to its own revenue-generating panel signs cannot stand. Unlike in *Metromedia*, the City is not treating different signs differently, for the street furniture signs that the City has authorized are essentially identical to petitioner's signs.

To be sure, the *Metromedia* plurality observed that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method," and that "[w]e deal here with the law of billboards." 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). But that observation simply reminds courts to be sensitive to the differences among media in applying generally applicable First Amendment principles. It certainly does not direct courts to apply an entirely different analytical framework to each and every medium, let alone to ignore this Court's post-*Metromedia* underinclusiveness cases in any challenge to advertising sign restrictions.

In sum, the decision below deepened an already palpable circuit conflict regarding whether *Metromedia* establishes any binding law at all, and gave that decision an extraordinarily aggressive reading that cannot be reconciled with this Court's other commercial speech precedents. This Court can and should now revisit *Metromedia* to resolve the confusion that its splintered decision in that case has spawned over the past generation. *See, e.g.*, *Rappa*, 18 F.3d at 1061 n.28 (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 B.Y.U. L. Rev. 473, 475 (2006) (noting that *Metromedia* "produced no majority opinion and consisted of five separate opinions that each suggested different lines

of reasoning," thereby leaving "courts and governments seeking a clear rule to apply to billboard regulations [to] face a difficult constitutional quandary"); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 Mich. L. Rev. 1877, 1878 (2005) (noting that "[t]he jurisprudence of visual clutter is in a state of disarray," and that "[t]he synergy of *Metromedia* and *Discovery Network* yields a dangerous path for any government actor seeking to reduce, but not completely eliminate, outdoor signs").

II. THIS COURT SHOULD RESOLVE A CIRCUIT CONFLICT REGARDING THE QUANTUM OF EVIDENCE THAT IS REQUIRED FOR THE GOVERNMENT TO JUSTIFY THE SUPPRESSION OF COMMERCIAL SPEECH

A. The Excessive Deference Afforded By the Second Circuit Squarely Conflicts with the Decisions of Numerous Other Circuits

It is well established that the government bears the burden of proving that all four prongs of the *Central Hudson* test have been satisfied. *Greater New Orleans*, 527 U.S. at 183; *Discovery Network*, 507 U.S. at 420. This Court has also made clear that the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). "Unlike rational basis

review, the *Central Hudson* standard does not permit [courts] to supplant the precise interests put forward by the State with other suppositions." *Id.* at 768.

In the wake of this Court's statements in *Edenfield*, the lower courts have struggled to determine *how much* evidence the government must adduce in order to discharge its burden of justifying a commercial speech restriction. This elementary issue has split the circuits into two distinct camps.

On the one hand, the First, Sixth, and Eleventh Circuits have held that a significant quantum of concrete evidence is required for the government to meet its burden under *Central Hudson*. In *Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007), the court held that an affidavit containing "a conclusory articulation of governmental interests" was insufficient to justify the suppression of commercial speech, and rejected the government's argument that "obviousness" or "common sense" suffice. Similarly, in *El Dia v. Puerto Rico Dep't of Consumer Affairs*, 413 F.3d 110, 115-16 (1st Cir. 2005), the court held that the government "failed to provide any evidence, other than conclusory assertions" justifying its favoring one commercial speaker over another. And in *Mason v. Florida Bar*, 208 F.3d 952, 956-58 (11th Cir. 2000), the court held that the government's "rote invocation of the words 'potentially misleading'" were insufficient to justify its suppression of commercial speech.

These cases stand in stark relief to the approach espoused by the Second Circuit. Unlike its sister circuits, the Second Circuit did not require the City to identify any evidence at all justifying its decision

to exempt its licensees' revenue-generating panel signs from the restrictions that apply to petitioner's identical signs. Instead, the Second Circuit held that "[i]t is not this Court's role to second guess the City's urban planning decisions," and that it would "defer to the City's judgment in controlling the placement of outdoor advertising." App. A 17, A-23.

The law in the Ninth Circuit is, if anything, even more extreme. In *Metro Lights*, a case that is factually similar to this case, the Ninth Circuit held that *Metromedia* requires courts to "*exude*[ ] deference" to local judgments about the wisdom of suppressing commercial speech. 551 F.3d at 910 (emphasis added). Although Los Angeles, like New York, had proffered no actual evidence explaining its differential treatment of identical signs on private property and the sidewalks, the Ninth Circuit conjured its *own* "plausible explanation": that the differential treatment "allowed [Los Angeles] to supervise a more concentrated supply of off-site signage, which plausibly contributes to its interest in visual coherence as a part of aesthetic quality." *Id.* at 912. The Ninth Circuit so held despite its acknowledgement that "the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network* and *Greater New Orleans*." *Id.* at 908.

This case provides an ideal vehicle for resolving this conflict because the record here contains *no* evidence supporting the City's haphazard regulation of panel advertising signs. The City relied exclusively on Mr. Woodward's "expert" opinion that, as a matter of urban design theory, it makes perfect sense to blanket the City's sidewalks with panel advertising

signs but prohibit their placement on private property just a few feet away. Leaving aside the dubious merits of Mr. Woodward's theory, the City's reliance on it is fatally flawed because he admittedly had nothing whatsoever to do with the City's decision to exempt its street furniture licensees from the rules that apply to everyone else. Indeed, the City policymakers who *did* make that decision generated a lengthy report detailing their reasoning, and that report (which is part of the record in this case) makes clear that they concluded that street furniture advertising signs *do* adversely affect aesthetics and neighborhood character, but that it was necessary for the City to make this aesthetic sacrifice in order to generate desired revenue.

B. The First Amendment Forbids the Government From Auctioning Off Exemptions to Speech Restrictions In Order to Generate Revenue

Revenue is the proverbial elephant in the room in this case. It could not be more obvious that the City believes that panel advertising signs should be prohibited for aesthetic and neighborhood character reasons, but that it determined that it could not pass on the opportunity to raise over $1 billion for its coffers through street furniture advertising. The City has strained to deny that it was motivated by the money, and with good reason: it is well established that the government may not sell an exemption to a speech restriction in order to generate revenue. As Justice Scalia has explained:

> [Suppose that a] law forbade shouting fire in a crowded theater, but granted dispensations to

> those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one [*i.e.*, raising revenue] which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); *see also Greater New Orleans*, 527 U.S. at 191 (rejecting the argument that exceptions to speech restrictions were justifiable because they generated revenue for the government).

There is nothing wrong with the City leveraging its assets to generate revenue. But once it is revealed that the City sacrificed its supposedly lofty interest in safeguarding aesthetics and neighborhood character by auctioning off the right to erect panel signs to the highest bidder, its justification for restricting petitioner's speech simply collapses.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 6, 2010

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Second Circuit

Nos. 09-1553, 09-1554

CLEAR CHANNEL OUTDOOR, INC., ATLANTIC OUTDOOR ADVERTISING, INC., SCENIC OUTDOOR, INC., TROYSTAR CITY OUTDOOR LLC, AND WILLOW MEDIA, LLC,

Consolidated-Plaintiffs-Appellants,

v.

CITY OF NEW YORK AND PATRICIA J. LANCASTER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Defendants-Appellees,

EDWARD FORTIER,

Consolidated-Defendant-Appellee.

No. 09-1571

METRO FUEL L.L.C.,

Plaintiff-Appellant,

v.

CITY OF NEW YORK,

Defendant-Appellee,

Argued: November 16, 2009
Decided: February 3, 2010

Before: POOLER and WESLEY, *Circuit Judges*, and KEENAN, *District Judge*.

WESLEY, *Circuit Judge*:

I. BACKGROUND

Plaintiffs, owners of billboards and panel signs in New York City, appeal from an Opinion and Order of the District Court for the Southern District of New York granting summary judgment to Defendants, the City of New York, Patricia J. Lancaster, named in her official capacity as Commissioner of the New York City Department of Buildings, and Edward Fortier, Director of Padlock and Enforcement (collectively the "City"). *Clear Channel Outdoor, Inc. v. City of N.Y.*, 608 F.Supp.2d 477 (S.D.N.Y. 2009) (Crotty, J.). The district court found that the challenged provisions of New York City's Zoning Resolution did not impose unconstitutional restrictions on Plaintiffs' commercial speech rights in violation of the First Amendment or the New York State Constitution. *Id.* at 481, 508.

The district court's opinion applies to two cases, argued in tandem before this Court.[1] The first case is the consolidated action of Plaintiffs Clear Channel Outdoor, Inc., Atlantic Outdoor Advertising, Inc., Scenic Outdoor, Inc., Troystar City Outdoor LLC,

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[1] The factual background giving rise to these disputes is set out in detail in the district court's opinion. *Clear Channel Outdoor*, 608 F.Supp.2d at 481-84. We assume familiarity with that background.

and Willow Media, LLC (collectively, the "Clear Channel Plaintiffs" or "Clear Channel"). The Clear Channel Plaintiffs own large billboards located near arterial highways in New York City.[2] Clear Channel operates an estimated 236 signs throughout New York City; approximately 85 of these signs face arterial highways. The Clear Channel signs that form the basis of this dispute are illuminated and range in size from 315 square feet to 11,258 square feet.

The Clear Channel Plaintiffs specifically challenge New York City Zoning Resolution §§ 42-55 and 32-662, which ban offsite advertising signs within 200 feet of, and within sight of, arterial highways in manufacturing and commercial districts. They also challenge the attendant enforcement regime set forth in New York City Local Law 14 of 2001, Local Law 31 of 2005, and Department of Buildings ("DOB") Rule 49 (collectively the "Regulations") as applied to their current inventory of arterial signs in New York City.

The second case involves Plaintiff Metro Fuel LLC, which owns smaller "panel" advertising signs.[3]

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[2] The roads designated as arterial highways in New York City include more than 70 expressways, parkways, boulevards, and toll crossings. *See* N.Y. City Zoning Resolution App'x C: Designation of Arterial Highways.

[3] As defined by the New York City regulation, an "advertising sign" is a sign that directs attention to a business, profession, commodity, service, or entertainment that is conducted, sold, or offered elsewhere than upon the premises where the sign is located. New York City Zoning Resolution § 12-10. A sign is not an "advertising sign" if it is "accessory to a use located on the zoning lot." *Id.* An "accessory sign" directs attention to a business or profession conducted on the premises where the

Metro Fuel's panel signs are internally illuminated poster advertisements that are approximately 24 square feet. Metro Fuel's signs are either placed on undeveloped lots, such as parking lots, affixed to the front of businesses, usually at or near ground level, or placed inside parking garages near the means of ingress and egress. Metro Fuel operates an estimated 440 panel signs in New York City. The challenged City regulations impact approximately 324 of Metro Fuel's panel signs.

Plaintiff Metro Fuel is not generally affected by the provisions of the Zoning Resolution that address arterial advertising signs. Rather, Metro Fuel challenges those aspects of the Zoning Resolution that control where it may place its panel advertisements, and how it may illuminate them.

A. History of the New York City Zoning Resolution

Since 1940, New York City's zoning regulations have banned outdoor advertising companies from placing commercial billboards, which do not advertise on-premises businesses, within 200 feet and within view of the City's major parkways and roadways. *See Infinity Outdoor, Inc. v. City of N.Y.*, 165 F.Supp.2d 403, 406 (E.D.N.Y.2001). On-premises signs are defined as "business signs" in the 1940 Zoning Resolution and as "accessory signs" in a 1961 revision of the Zoning Resolution. The 1961 Zoning Resolution added location and illumination restrictions relevant to Metro Fuel's panel signs.

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sign is located. *Id.* Accessory signs are permitted in all commercial and manufacturing districts, subject to height, size, illumination, and projection limitations. *Id.* § 32-62.

The basic prohibition contained in the 1940 Zoning Resolution remains in force today in manufacturing and certain commercial districts where advertising signs are permitted. During the periods between 1940 and 1979 arterial advertising signs were erected and maintained in violation of the Zoning Resolution. Enforcement efforts by the City were rare.

In 1965, Congress enacted the Highway Beautification Act to "protect the public investment" in highways, to "promote the safety and recreational value of public travel, and to preserve natural beauty."[4] 23 U.S.C. § 131(a). In order to comply with the Highway Beautification Act, New York City granted legal non-conforming status to existing advertising signs that failed to comply with Zoning Resolution provisions, but which complied with state and federal standards. The signs that did not comply with state and federal standards remained illegal.

The City Council amended the Administrative Code in 2001 by adopting Local Law 14, which sought to enhance the City's ability to enforce the arterial advertising regulations.[5] In a public hearing

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[4] States that did not comply with the requirements of the Act would be in jeopardy of losing up to ten percent of their annual federal aid highway funds. *See* 23 U.S.C. § 131(b).

[5] Local Law 14 established a permitting scheme for all arterial signs, N.Y. Admin. Code §§ 26-253 to 26-255, and created a registration system for outdoor advertising companies, *id.* § 26-260. The law also imposed a requirement that each outdoor advertising company provide the New York City Department of Buildings ("DOB") with an inventory of all of its signs, including a certification that all signs are in compliance with the Zoning Resolution. *Id.* §§ 26-260 to 26-261. In addition, Local Law 14 provided the DOB with the authority to "revoke,

regarding the amendment, the President of the New York Outdoor Advertising Group (a then-existing industry group comprised of several outdoor advertising companies) submitted written materials admitting that "the outdoor advertising industry unquestionably employed *creative* methods to obtain building permits for arterial highway signs." Neufeld Decl. ¶ 21, May 12, 2008 (emphasis added).

The President of the Outdoor Advertising Group did not dispute that the industry routinely claimed that advertising signs would be used for permissible on-premises accessory business purposes in order to obtain permits from the DOB. Despite these representations made to the DOB, the signs were in fact used for offsite advertising purposes, which were proscribed under the applicable regulations. Some outdoor advertising companies, including the Plaintiffs, also erected billboards without obtaining permits of any kind.

In 2005, the City Council adopted Local Law 31 that revised Local Law 14 in various ways, but preserved the main requirements and provisions of Local Law 14 at issue in this case. Neither Local Law

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suspend or refuse to renew the registration of an outdoor advertising company or impose fines or other penalties where it is deter-mined by the Commissioner, after notice and an opportunity to be heard," that an out-door advertising company "made statements that it knew or should have known [we]re false in any application or certification filed with the" DOB, failed to provide an inventory of its signs, or otherwise "violated the DOB's rules pertaining to outdoor advertising." N.Y. Admin. Code § 26-260(d). Finally, Local Law 14 provided for civil and criminal penalties, and provided a mechanism for the DOB to bring a nuisance abatement action for noncompliance. *Id.* §§ 26-256, 26-262.

went into effect in material part until the DOB promulgated Rule 49 on July 26, 2006.[6]

B. The Current Controversy

Plaintiffs do not dispute the City's authority to enact and enforce regulations tailored to address outdoor commercial advertising. However, they argue that "loopholes and inconsistencies in the regulatory regime" prevent the regulations from advancing a substantial government interest, rendering it invalid under the First Amendment.

1. The Clear Channel Plaintiffs

The Clear Channel Plaintiffs first contend that the City's sporadic enforcement of its regulatory regime from 1940 to 2001 undermines its validity. They state that "a great number of ... signs were built abutting the arterial highways from 1940 through 2001. In general, the City issued permits for large accessory signs along the arterial highways, and, without permission, the sign owners converted the signs to advertising signs." Plaintiffs maintain that the "City has sought to newly enforce its ban on arterial advertising signs on private property while permitting offsite advertising signs on government property, including on billboards, bus shelters, subway[ ] entrances and phone kiosks, several hundred of which are within 200 feet of an arterial

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[6] Rule 49 requires that outdoor advertising companies submit an inventory of their signs and structures located within 900 feet, and within view, of an arterial highway. Rules of the City of New York § 49-15(a). When applicable, documentation must also be submitted that establishes that a sign has been granted non-conforming use status. *Id.* § 49-15(d)(15).

highway."[7] In support of this assertion, Plaintiffs allege that "there are currently between 1,400 and 1,600 advertising signs on government or public property on billboards, bus shelters, phone kiosks and subway[ ] panels on roadways designated as arterial highways or blocks intersecting with arterial highways."

Plaintiffs next draw our attention to a few specific inconsistencies in the applicable regulations, which the City subsequently remedied. First, two Clear Channel signs, both measuring 960 square feet and located within 200 feet and in view of the Belt Parkway in Brooklyn. Following the commencement of these lawsuits, the City declined to renew Clear Channel's lease to maintain these signs and requested that the signs be taken down. Second, arterial advertising signs on City-owned property located within 200 feet, and within view of, the West Side Highway. Plaintiffs acknowledge that the company that operates these signs has entered into an agreement with the City to remove these signs. Yet, Plaintiffs maintain that these signs undermine the alleged purposes of the Zoning Resolution and render it an unconstitutional restraint on commercial speech.

The Clear Channel Plaintiffs maintain that "[o]ne of the most glaring inconsistencies in the regulatory scheme is the exemption for Arterial Advertising Signs on Transit Authority Property." As the district

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[7] Essentially, Plaintiffs have benefitted from their own misconduct and now suggest to this Court that the City should be precluded from enforcing its zoning scheme because it has not always enforced its regulations in a manner that would allow it to achieve full compliance. That cannot be the law.

court noted, the "parties disagree over the City's reasons for not enforcing its laws on [the property controlled by the Metropolitan Transit Authority ('MTA'), the Port Authority of New York and New Jersey (the 'Port Authority'), and Amtrak,] and the City's good faith in prospectively enforcing the Zoning Resolution." *Clear Channel*, 608 F.Supp.2d at 489. City officials claim that they did not enforce the Zoning Resolution against the MTA, the Port Authority, or Amtrak because they believed that they did not have the authority to do so. The City now concedes that it has the legal authority to enforce the Zoning Resolution against properties owned or controlled by the MTA, including the Long Island Railroad ("LIRR") and the Metro North Railroad. *Clear Channel*, 608 F.Supp.2d at 489.

The Clear Channel Plaintiffs take the position that "New York City viewed increased revenues for mass transit-not aesthetics or traffic safety-as the paramount concern in actively supporting an exemption for Transit Authority signs from its zoning regulations." Plaintiffs contend that "the City has made a concerted effort over several decades ... not to enforce the Arterial Advertising Ban against billboards on any railroad property, including billboards on the MTA, LIRR, Conrail, Amtrak and other railroad or Port Authority property."

Finally, Plaintiffs dispute the validity of the City's proffered justification for its regulatory scheme-the desire to promote traffic safety and aesthetics. They assert that "there is no credible evidence that these signs, which have stood [illegally] for years and often decades, have created any traffic problems." Clear Channel Outdoor, Inc., Second Am. Compl. ¶ 3.

2. Metro Fuel: The Street Furniture Franchise

In 2006, the City entered into a 20-year non-exclusive franchise contract (the "Street Furniture Franchise") with a private company, Cemusa, Inc. ("Cemusa"), for the installation, operation, and maintenance of bus shelters, automatic public toilets, newsstands, and other "public service structures." Pursuant to this contract, the City shares in revenue generated by advertisements located on the street furniture structures. There are allegedly 128 "urban panels," which are mounted on the railings of sidewalk subway entrances near roads that have been designated by the City as arterial highways and an additional 24 urban panels on subways entrances on blocks that intersect with arterial highways.

Metro Fuel argues that the City's street furniture franchise allows Cemusa to place advertisements on bus shelters that are similar to their advertisements, but which are not subject to the Zoning Resolution. Indeed, Metro Fuel alleges that the City expressly amended its Administrative Code to permit advertising on the exterior of newsstands in conjunction with its contract with Cemusa. Metro Fuel maintains that this exception is evidence of the regulation's asserted constitutional infirmity.

With respect to Metro Fuel, the City concedes that Metro Fuel's "panel signs are signs of approximately the same size as, and sited in approximately the same manner as, the advertisements on the City's bus stop shelters." But, the City maintains that "the provisions of the Zoning Resolution which restrict the permissible locations of panels signs, as well as the size, height, and

illumination of such signs, are generally designed to protect neighborhood character, consistent with zoning designations, and to address aesthetic concerns." Essentially, the City argues that Metro Fuel's panel signs can be permissibly distinguished from the coordinated street furniture.

II. PROCEDURAL HISTORY

Clear Channel filed its complaint against Defendants on October 6, 2006.[8] The City moved for summary judgment against the Clear Channel Plaintiffs on May 12, 2008. On June 23, 2008, the Clear Channel Plaintiffs cross-moved for summary judgment. Metro Fuel filed its complaint against Defendants on September 21, 2007. Metro Fuel filed a motion for summary judgment or, alternatively, for a preliminary injunction on July 28, 2008. The City cross-moved for summary judgment against Metro Fuel on August 25, 2008.

In a well-reasoned opinion, the district court concluded that there were "no issues of material fact in either of the cases." *Clear Channel*, 608 F.Supp.2d at 515. It held that "[a]ny factual disputes are trivial, non-essential, and do not materially affect the outcome of the cases." *Id.* The court found a grant of

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[8] Subsequent to the filing of Clear Channel's complaint, Atlantic Outdoor, Scenic Outdoor, Troystar City Outdoor, and Willow Media all filed complaints against the City, which were consolidated with the Clear Channel action on October 20, 2006, pursuant to Federal Rule of Civil Procedure 42(a). The consolidated Plaintiffs filed a motion for a preliminary injunction to pre-vent enforcement of the arterial advertising restrictions, Local Law 14, Local Law 31, and DOB Rule 49. In response, the City stayed enforcement of the challenged regulations until the resolution of this litigation.

summary judgment in favor of the City appropriate because the "City's zoning regulations ... satisfy the constitutional test for commercial speech restriction and are not unconstitutionally underinclusive." *Id.*

In reaching its conclusion that the City's zoning regulations pass constitutional muster, the court determined that the City "has substantial interests in restricting outdoor advertising signs near highways, its zoning ordinance will directly advance those interests, and the regulations are not more extensive than necessary." *Id.* The district court found that the "few exceptions to the ban on off-site commercial arterial advertising that remain along the City's roads do not undermine the constitutionality of the Zoning Resolution." *Id.* The court further noted that the City is permitted "to value one type of commercial speech over another." *Id.* at 500.

The district court also concluded that the registration and documentation requirements challenged by Plaintiffs "also pass constitutional muster." *Id.* at 515. It ruled that the "provisions of Rule 49 directly advance the City's interests in traffic safety and aesthetics and [that] ... the regulations are narrowly tailored" to meet the City's goals. *Id.* at 507.

Finally, the district court rejected Plaintiffs' challenge based on the New York State Constitution. *See* N.Y. Const. art. I, § 8. It found "no indication either in the case law or in the parties' arguments that the New York State courts impose a stricter test for commercial speech regulation." *Clear Channel*, 608 F.Supp.2d at 508.

III. DISCUSSION

A. Standard of Review

It is well settled that summary judgment may be granted only if there is "no genuine issue as to any material fact." Fed.R.Civ.P. 56(c)(2). We review de novo the district court's grant of summary judgment. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 122 (2d Cir.2009). The "scope of our review ... does not change where, as here, summary judgment was granted to one party and denied to the other in the procedural context of cross-motions. Indeed, cross-motions are no more than a claim by each side that it alone is entitled to summary judgment." *N.Y. State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 838 (2d Cir.1994) (internal citations, quotation marks, and alteration omitted). In cases such as this one, in which claims are raised under the First Amendment, we have "an obligation to make an independent examination of the whole record." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (internal quotation marks omitted).

B. The *Central Hudson* Test

It is clear that the advertisements in question involve commercial speech. *See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (2d Cir.1998). In *Central Hudson*, the Supreme Court articulated the current test for assessing the constitutionality of restrictions on commercial speech.[9] *Cent. Hudson Gas & Elec. Corp. v. Pub.*

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[9] For a brief recitation of the development of the commercial speech doctrine, see, for example, *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

Serv. Com-m'n, 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (reaffirming application of *Central Hudson* test in commercial speech cases).

As a threshold matter, in order to warrant First Amendment protection under the *Central Hudson* framework, the communication must be "neither misleading nor related to unlawful activity." 447 U.S. at 564, 100 S.Ct. 2343. That the commercial speech at issue in this case is lawful and not misleading, and therefore entitled to First Amendment protection, is not in dispute. See *Clear Channel*, 608 F.Supp.2d at 494 n. 21.

A governmental entity that wishes to regulate protected commercial speech "must assert a substantial interest to be achieved" by the restrictions. *Cent. Hudson*, 447 U.S. at 564, 100 S.Ct. 2343. The "twin goals" of protecting the aesthetic appearance of a city and maintaining traffic safety are "substantial government goals."[10] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551, 121 S.Ct.

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[10] Additionally, we have held that a governmental entity "need not rely on the justifications offered ... when the [regulation] was enacted, since any insufficiency in the original motivation does not diminish other interests that the restriction may now serve." *Anderson v. Treadwell*, 294 F.3d 453, 461 n. 5 (2d Cir.2002) (internal quotation marks omitted). Thus, to the extent that Plaintiffs assert that the City's proffered justifications for the Zoning Resolution were not raised at the time of its enactment, such complaints do not further their position in this litigation.

2404, 150 L.Ed.2d 532 (2001); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806-07, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *Long Island Bd. of Realtors, Inc. v. Vill. of Massapequa Park*, 277 F.3d 622, 627-28 (2d Cir.2002). Plaintiffs do not disagree that the City's asserted interests in this case are "substantial."

In order to satisfy constitutional requirements, as set out in *Central Hudson*, the restriction must satisfy two further criteria. "First, the restriction must directly advance the state interest involved"; and second, it must not be "more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 564, 566, 100 S.Ct. 2343. The City bears "the burden of establishing a reasonable fit between the [regulatory scheme's] ends and the means chosen to accomplish those ends." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted).

C. The City is Not Required to Adopt the Least Restrictive Means of Regulating Outdoor Commercial Advertising

The dictates of *Central Hudson* do not require the City to adopt the "least restrictive means" of advancing its asserted interests. *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). As the Supreme Court has made clear, "'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm

of noncommercial expression.' "[11] *Id.* (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)).

In declining to require that the government employ the least restrictive means in regulating commercial speech, the Supreme Court has explained that this means that "we have not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. And we have been loath to second-guess the [g]overnment's judgment to that effect." *Fox*, 492 U.S. at 478, 109 S.Ct. 3028 (internal citation and quotation marks omitted); *see also Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999). Thus, what is "require[d] is a fit between the legislature's ends and the means chosen to accomplish those ends-a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*,

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[11] Commercial speech requires less robust protection than other forms of speech that must be more carefully guarded, such as political or religious speech. This is so be-cause "commercial speech is more durable than other types of speech, since it is the off-spring of economic self-interest." *Discovery Network*, 507 U.S. at 439, 113 S.Ct. 1505 (internal quotation marks omitted) (Rehnquist, C.J., dissenting). And, commercial speech is also understood as "less central to the interests of the First Amendment" than other forms of speech. *Dun & Brad-street, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n. 5, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). "The protection avail-able for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Cent. Hudson*, 447 U.S. at 563, 100 S.Ct. 2343.

492 U.S. at 480, 109 S.Ct. 3028 (internal citations and quotation marks omitted).

Supreme Court precedent instructs that, if the City's determination about how to regulate outdoor commercial advertising is "reasonable"-and we find that it is in this case-then we should defer to that determination. See *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *see also Riel v. City of Bradford*, 485 F.3d 736, 753-54 (3d Cir.2007) (stating that "government should not be left with a choice of enacting a regulation banning [or burdening] all signs in a particular geographic area or none" (internal quotation marks omitted) (alteration in original)). And, in considering the validity of the City's zoning scheme, we must examine the regulations in relation "to the over-all problem the government seeks to correct." *Ward*, 491 U.S. at 801, 109 S.Ct. 2746.

In this case, Metro Fuel characterizes the City's regulatory scheme as premised on a "radical urban design theory." However, it is not this Court's role to second guess the City's urban planning decisions. Similarly, the Clear Channel Plaintiffs contend that the City should have adopted a "size and spacing" regulatory regime. The City's rejection of an alternative model does not invalidate the regime selected by the City. See, e.g., *Fox*, 492 U.S. at 478, 109 S.Ct. 3028; *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 820-21 (6th Cir.2005); *Treadwell*, 294 F.3d at 463. And, the City is afforded "considerable leeway ... in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech." *Vill. of Massapequa Park*, 277 F.3d at 627-28; see also

Taxpayers for Vincent, 466 U.S. at 815-16, 104 S.Ct. 2118; *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 35 (1st Cir.2008). That the City considered, and rejected, an alternative scheme is of no constitutional moment. *See Ward*, 491 U.S. at 797-98, 109 S.Ct. 2746.

D. Underinclusivity

In this case, Plaintiffs' challenge to the zoning regime under the final two prongs of *Central Hudson* centers primarily on their contention that the regulations are unconstitutionally underinclusive. They argue that the Zoning Resolution does not "fit" with the City's stated objectives. *See Edge Broad. Co.*, 509 U.S. at 427-28, 113 S.Ct. 2696.

The Supreme Court has explained that a regulation may be unconstitutional if it "in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages." *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). There is no basis for finding this form of content-based discrimination in this case.[12] Cf. *Linmark Assocs., Inc. v. Twp. of*

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[12] There is also no basis for a finding that the City's Zoning Resolution impermissibly favors government speech over private speech. It is well established that, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). However, the zoning regulations at issue cannot be said to function as an "at-tempt to give one side of a debatable public question an advantage in expressing its views to the people." *Ladue*, 512 U.S. at 51, 114 S.Ct. 2038 (internal quotation marks omitted). Rather, the zoning scheme is an at-tempt to control the location of outdoor commercial advertising. *See Field Day, LLC v. County of Suffolk*, 463 F.3d

Willingboro, 431 U.S. 85, 93-98, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Nat'l Adver. Co. v. Town of Niagra*, 942 F.2d 145, 147-48 (2d Cir.1991).

A related form of impermissible underinclusivity is presented by a regulation that draws arbitrary distinctions, or that draws distinctions that "bear[ ] no relationship *whatsoever* to the particular interests that the city has asserted." *Discovery Network*, 507 U.S. at 424, 113 S.Ct. 1505. Plaintiffs contend the Zoning Resolution is underinclusive because no meaningful distinctions exist between their regulated signs and billboards, and legally permissible advertising. A regulation may also be deemed constitutionally problematic if it contains exceptions that "undermine and counteract" the government's asserted interest. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). These two forms of underinclusivity are at the heart of Plaintiffs' challenge.

1. *Metromedia* Governs Plaintiffs' Challenge

The Supreme Court's decision in *Metromedia, Inc. v. City of San Diego* is controlling. 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The relevant

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167, 174 (2d Cir.2006). While the City may not discriminate between speakers or viewpoints, it "may value one category of commercial speech over another where it has valid reasons for doing so." *Clear Channel*, 608 F.Supp.2d at 502 (citing *Metromedia*, 453 U.S. at 511-12, 101 S.Ct. 2882). Thus, the "City is free to value a controlled and harmonious streetscape without compromising its ability to restrict uncontrolled and obtrusive advertising on the City's arterial road network." *Id.* And, "[t]he City has stated that it will enforce the Zoning Resolution against all billboards on City and government property, where it is empowered and authorized to do so." *Id.*

portion of the ordinance at issue in *Metromedia* banned offsite commercial advertising signs, but not onsite signs.[13] *Id.* at 493 n. 1, 101 S.Ct. 2882. The ordinance also provided an exception for "signs falling within 12 specified categories."[14] *Id.* at 494, 101 S.Ct. 2882. In *Metromedia*, the plaintiffs argued "that the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite advertising and other specified signs." *Id.* at 510-11, 101 S.Ct. 2882.

The Court rejected the *Metromedia* plaintiffs' under-inclusivity argument. It held that even though the ordinance did not apply to onsite advertising, it still directly advanced the City of San Diego's interests in traffic safety and aesthetics. *Id.* at 511, 101 S.Ct. 2882. The Court concluded that the city could permissibly distinguish between different forms of advertisements. *Id.* at 511-12, 101 S.Ct. 2882. Lastly, the Supreme Court held that it did not offend the Constitution for San Diego to "distinguish

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[13] The ordinance at issue in *Metromedia* also banned non-commercial signage. A majority of the Court upheld the regulation only as it pertained to commercial speech. See 453 U.S. at 512-13, 101 S.Ct. 2882. In this appeal, we are only concerned with the City's regulation of outdoor advertising of billboards and signs containing commercial speech.

[14] The specified categories exempted from the City of San Diego's sign ordinance included: government signs; signs located at public bus stops; signs manufactured, transported or stored within the city, if not used for advertising purposes; signs within malls, courts, and arcades; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; signs on public transportation, including buses and taxis; and signs on commercial vehicles. 453 U.S. at 494-95, 101 S.Ct. 2882.

between the relative value of different categories of commercial speech." *Id.* at 514, 101 S.Ct. 2882.

Plaintiffs in this case argue that the City violates the protections afforded commercial speech when it distinguishes between their signs or billboards and those located on government property. But, the Supreme Court has already rejected "the argument that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located." *Taxpayers for Vincent*, 466 U.S. at 810, 104 S.Ct. 2118. It is clear that, despite its exceptions, New York City's Zoning Resolution directly advances its interests in traffic safety and aesthetics. *See Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). Indeed, in *Metromedia*, the Court made explicit reference to the exceptions to the ban of offsite advertising, but did not find the exemptions constitutionally problematic. 453 U.S. at 495, 101 S.Ct. 2882.

Plaintiffs' argument hinges, in part, on the assertion that the City's regulatory regime runs afoul of the First Amendment because it does not *fully* accomplish the articulated objectives. However, contrary to Plaintiffs' contentions, the Supreme Court has previously rejected that argument. Of particular relevance to this case, in *Metromedia*, the Court rejected the same contention raised here: that the ban on offsite advertising was unconstitutionally underinclusive because it did not extend to onsite advertising. *Id.* at 511, 101 S.Ct. 2882; *see also Posadas*, 478 U.S. at 342 (rejecting the claim that a ban on promotional advertising of casino gambling aimed at Puerto Rican residents was invalid because

other types of gambling were permitted to be advertised to local residents).

Plaintiffs next argue that the City's contract to permit coordinated advertising on street furniture makes the Zoning Resolution unconstitutionally underinclusive. On this point, we find persuasive the Ninth Circuit's decision in *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir.2009), *cert. denied*, --- U.S. ----, 130 S.Ct. 1014, --- L.Ed.2d ---- (2009). In *Metro Lights*, the Ninth Circuit considered the question of "whether a city violates the First Amendment by prohibiting most offsite commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops." 551 F.3d at 900. This scenario is similar to the one presented here. In this case, the City contracted with Cemusa for the installation, operation, and maintenance of bus shelters, automatic public toilets, newsstands, and other "public service structures." The plaintiff in *Metro Lights*, like Plaintiffs here, made the alleged "underinclusivity" of the zoning regime the "centerpiece of its First Amendment challenge on appeal." 551 F.3d at 904. The *Metro Lights* court rejected plaintiff's underinclusivity challenge. *See id.* at 911. We conclude that the same result is appropriate here.

In *Metro Lights*, Los Angeles argued "that the proliferation of offsite advertising by numerous and disparate private parties creates more distracting ugliness than a single, controlled series of advertisements on city property over which the City wields contractual supervision." *Id.* at 910. The *Metro Lights* court accepted the city's argument, based on the reasoning and holding of *Metromedia*.

Id. We similarly accept the City's argument that the controlled advertising regime established by its contract with Cemusa is sufficiently distinct from Plaintiffs' advertising that is subject to the zoning restrictions. And, as in *Metromedia* and *Metro Lights*, we defer to the City's judgment in controlling the placement of outdoor advertising. *Metromedia*, 453 U.S. at 512, 101 S.Ct. 2882; *Metro Lights*, 551 F.3d at 910-11.

2. *Discovery Network*, *Rubin* and *Greater New Orleans* Dictate the Same Result as *Metromedia*

Plaintiffs do not explicitly dispute that *Metromedia* applies to their challenge to the New York City Zoning Resolution. *Clear Channel*, 608 F.Supp.2d at 495. However, they contend that more recent Supreme Court cases, *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) require that we strike down the City's zoning regime. We reject Plaintiffs' argument; we are persuaded that the exceptions to the Zoning Resolution do not "undermine [or] counteract its effects," *Rubin*, 514 U.S. at 489, 115 S.Ct. 1585, and that the regulations "directly and materially advance[ ] [the City's] aim." *Greater New Orleans*, 527 U.S. at 193, 119 S.Ct. 1923.

In resolving disputes, we "should follow the case which directly controls." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). As already

discussed, the Supreme Court's decision in *Metromedia* is most directly on point. It is particularly significant, in the First Amendment context, that the Supreme Court has pointed out that "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." *Metromedia*, 453 U.S. at 501, 101 S.Ct. 2882. As in *Metromedia*, "[w]e deal here with the law of billboards." *Id.* And, as the Court has held, signs "pose distinctive problems that are subject to municipalities' police powers." *Ladue*, 512 U.S. at 48, 114 S.Ct. 2038. This is so because "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *Id.* The cases relied on by Plaintiffs, which are distinguished below, must be evaluated in light of this distinct First Amendment factual and legal context.

First, *Discovery Network* is distinguishable from our case. In that case, the City of Cincinnati drew a distinction between news racks containing commercial publications and news racks containing newspapers. The distinction bore "no relationship *whatsoever* to the particular interests that [Cincinnati] ha[d] asserted." 507 U.S. at 424, 113 S.Ct. 1505 (emphasis in original). By contrast, there is clearly a relationship between the City's Zoning Resolution, which regulates the placement of outdoor commercial advertising, and its interest in aesthetics and traffic safety. Evaluating the zoning scheme as a whole, we conclude that the regulations are "part of a substantial effort to advance a valid state interest." *Bad Frog Brewery*, 134 F.3d at 100.

Second, in *Discovery Network*, the city "asserted an interest in [a]esthetics," but the regulated news racks were "no greater an eyesore" than those left unregulated. *Id.* at 425, 113 S.Ct. 1505. Indeed, the regulated and unregulated news racks were identical. Therefore, they were all "equally at fault," regardless of their contents.[15] *Id.* at 426, 113 S.Ct. 1505. In this case, we defer to the City's judgment that unregulated signage and billboards are a greater eyesore than coordinated street furniture bearing advertisements. The regulation in *Discovery Network* ran afoul of the principles articulated in *Central Hudson* because there was no "logical connection" between the interests asserted by Cincinnati and the regulatory scheme. *Metro Lights*, 551 F.3d at 905. The same cannot be said of New York City's Zoning Resolution.

Third, the benefit from the regulation in *Discovery Network* was deemed to be "minute or paltry." 507 U.S. at 441, 113 S.Ct. 1505 (internal quotation marks omitted). Here, the City has a "sufficient basis" to believe that the impact of the zoning regulations will substantially advance its proffered interests. *See Metromedia*, 453 U.S. at 508, 101 S.Ct. 2882; *see also RTM Media, LLC v. City of Houston*, 584 F.3d 220, 226-27 (5th Cir.2009). Finally, the City of Cincinnati "enacted a sweeping ban that bar [red] from its sidewalks a whole class of constitutionally protected speech." *Discovery Network*, 507 U.S. at 430, 113 S.Ct. 1505. The City of

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[15] There was an additional concern in *Discovery Network* that the regulated commercial speech was not sufficiently distinguishable from unregulated non-commercial speech. 507 U.S. at 419, 113 S.Ct. 1505. No similar concern is implicated on the facts of the cases presently before this Court.

New York has taken no such action. Rather, it has simply enacted regulations that control the placement of outdoor advertising.

In *Rubin*, the Supreme Court found that a provision of the Federal Alcohol Administration Act ("FAAA") that "prohibited disclosure of the alcohol content of beer on labels or in advertising" violated the First Amendment. 514 U.S. at 478, 115 S.Ct. 1585. The government's asserted interest was in "curbing 'strength wars' by beer brewers who might seek to compete for customers on the basis of alcohol content." *Id.* at 483., 115 S.Ct. 1585 However, the Bureau of Alcohol, Tobacco and Firearms simultaneously required disclosure of alcohol content on the labels of wine and spirits. *Id.* at 484, 115 S.Ct. 1585. The Court held that the portion of the FAAA at issue "failed to advance the interest in suppressing strength wars sufficiently to justify the ban." *Id.* at 486, 115 S.Ct. 1585.

Rubin is easily distinguishable from our case. Rubin involved an attempt to "suppress[] the free flow of factual information." *Id.* at 484., 115 S.Ct. 1585 Here, the City makes no attempt to limit the free flow of factual commercial information, which the Supreme Court has deemed "indispensable to the proper allocation of resources in a free enterprise system ... [and] indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

Rubin is further distinguishable from the factual scenario presented by these appeals because the relevant provision of the FAAA could not "directly

and materially advance [the government's] asserted interest because of the overall irrationality of the ... regulatory scheme." 514 U.S. at 488, 115 S.Ct. 1585. Indeed, the "unique and puzzling regulatory framework ensure[d] that the labeling ban [would] fail to achieve" the government's asserted interest. *Id.* at 489., 115 S.Ct. 1585 This was so because "other provisions of the same Act directly undermine and counteract its effects." *Id.* Irrespective of its exceptions, it simply cannot be said that the Zoning Resolution at issue undermines and counteracts its stated ends. Rather, the zoning regulations challenged by Plaintiffs present an integrated effort by the City to reduce visual clutter, to improve the overall aesthetic appearance of the City, and to regulate traffic safety. The fact that the City has chosen to value some types of commercial speech over others, *Metromedia*, 453 U.S. at 512, 101 S.Ct. 2882, does not make the regulation irrational.

In *Greater New Orleans*, the Supreme Court struck down a law that "banned broadcast advertising for most private casinos but exempted, among others, advertising for Indian tribal casinos." *Metro Lights*, 551 F.3d at 905 (citing 527 U.S. at 195-96, 119 S.Ct. 1923). The government maintained that the broadcasting ban directly advanced its interest in "alleviating the social costs of casino gambling by limiting demand." *Greater New Orleans*, 527 U.S. at 189, 119 S.Ct. 1923. However, the Court found the regulation failed to pass constitutional scrutiny under *Central Hudson* because forbidding advertising of some casinos but not others "merely channel[s] gamblers to one casino rather than another." *Id.* Thus, the regulation was entirely "self-defeating." *See Metro Lights*, 551 F.3d at 906.

The distinctions drawn by the Zoning Resolution between permissible and impermissible locations for outdoor commercial advertising are meaningful and do not defeat the purpose of the City's regulatory scheme. The City may legitimately allow limited and controlled advertising on street furniture, while also reducing clutter on City sidewalks. Allowing some signs does not constitutionally require a city to allow all similar signs. The zoning scheme does not result in a mere channeling effect. The City's interests in aesthetics, preservation of neighborhood character, and traffic safety continue to be advanced, even though limited and controlled advertising is permitted on street furniture.

As we have previously noted, "the Supreme Court has made clear that underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced." *Treadwell*, 294 F.3d at 463 (citing *Posadas*, 478 U.S. at 343, 106 S.Ct. 2968; *Metromedia*, 453 U.S. at 511, 101 S.Ct. 2882). Here, the exceptions to the Zoning Resolution do not render the scheme unconstitutional.

E. Plaintiffs' "Inverse Mootness" Argument Must Fail

Plaintiffs maintain that post-litigation actions taken by the City are insufficient to cure the alleged constitutional violation or to render the examples of infringement inapplicable to their challenge. The City objects to Plaintiffs' characterization of its efforts to enforce its zoning regulations as litigation inspired. But, the City does not argue that Plaintiffs' First Amendment challenge is moot, and rightly so. Rather, it is Plaintiffs who argue that this Court should apply a principle used in analyzing questions

of mootness to this case. They contend, in effect, that recent enforcement actions taken by the City should be disregarded by this Court when considering the import of their examples of exceptions to the Zoning Resolution. However, the principles of the mootness doctrine on which Plaintiffs seek to rely are inapposite here.

In analyzing a mootness challenge, "factual changes made by a defendant after litigation has commenced cannot render a case moot unless it is absolutely clear the defendant cannot resume the allegedly offending conduct." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Plaintiffs contend that, in this case, nothing prevents the City from resuming the offending conduct. They further assert that the "heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with" the City. *Id.* at 189, 120 S.Ct. 693 (internal quotation marks omitted and alteration in original).

The voluntary cessation of allegedly illegal activity may render a case moot "if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Campbell v. Greisberger*, 80 F.3d 703, 706 (2d Cir.1996) (internal quotation marks omitted). Here, however, it is Plaintiffs who have erected signs and billboards in contravention of City zoning regulations. Essentially, Plaintiffs complain of a self-inflicted wound. They violated the City's duly enacted zoning ordinance and seek to justify continued violation by citing a prior history of lax

enforcement. Meager past efforts at zoning enforcement are not the stuff of economic expectations. Governments generally are not estopped by the misdeeds of their agents or employees. See, e.g., *Petrelli v. City of Mount Vernon*, 9 F.3d 250, 256-57 (2d Cir.1993). "[P]rinciples of laches or estoppel do not bar a municipality from enforcing ordinances that have been allowed to lie fallow." *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir.1994).

In other words, Plaintiffs suggest that the City will simply revert to a pattern of non-enforcement after the resolution of this litigation. This argument is unpersuasive. First, the record demonstrates that the City's current efforts to remove signs from government property began well before this litigation was instituted. Second, Plaintiffs' speculation that the City will fail to enforce its regulations is insufficient. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir.2008). Plaintiffs' bare allegation that the City will exhibit bad faith in failing to enforce its regulations in an evenhanded manner in the future is similarly unavailing. Indeed, just as "[s]ome deference must be accorded to a [governmental entity's] representations that certain conduct has been discontinued," *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 376 (2d Cir.2004), the City is entitled to deference with respect to its assurances that it has undertaken a good-faith enforcement effort.

In order to demonstrate that the Zoning Resolution is tailored to serve a substantial interest, the City must continue its enforcement efforts. *See Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16-17 (2d Cir.1999). However, this does not mean

that Plaintiffs can defeat the City's asserted interest by violating the regulation. Plaintiffs' argument that we should disregard the City's recent enforcement efforts in our analysis confuses two concepts. In regulating commercial speech, the City is entitled to *deference in crafting its zoning regulations. Vill.* of Massapequa Park, 277 F.3d at 627-28. But, the requirement that a municipality enforce its zoning ordinance does not bear on the permissibility or impermissibility of exceptions that are part of the regulatory scheme. As articulated above, assuming the existence of the challenged exceptions, here, the Zoning Resolution constitutes an appropriate "fit" with the City's asserted ends. *Rubin*, 514 U.S. at 486, 115 S.Ct. 1585.

Finally, to the extent that Plaintiffs are attempting to create a material issue of disputed fact based on their claim that the "City did little or nothing to enforce the Arterial Advertising Ban for decades," this is insufficient to defeat the City's motion for summary judgment. *See Park Ave. Tower Assocs. v. City of N.Y.*, 746 F.2d 135, 141 (2d Cir.1984). Plaintiffs have not met their burden to come forward with admissible evidence that the City will fail to enforce its zoning regulations in the future. To the contrary, the evidence suggests that the City is now undertaking a concerted effort to enforce the Zoning Resolution.

F. New York City's Registration and Documentation Scheme is a Constitutionally Permissible Regulation of Commercial Speech

The Clear Channel Plaintiffs argue that the documentation and registration requirements set out in Local Laws 14 and 31, and Department of Buildings ("DOB") Rule 49 are unconstitutional under the standards established by *Central Hudson*. Rule 49 lays out the criteria that must be satisfied by an outdoor advertising company that seeks to demonstrate that one of its signs should be accorded non-conforming use status. *Clear Channel*, 608 F.Supp.2d at 504. A sign with non-conforming use status is not subject to the Zoning Resolution and may carry off-site arterial advertising. *Id.*

Plaintiffs maintain that the documentation and registration requirements do not materially advance the City's interests. Plaintiffs insist that they will replace commercial copy on existing signs with non-commercial copy. Plaintiffs also argue that the requirements are unduly onerous because much of the documentary evidence is now unavailable. We disagree. Given the outdoor advertising industry's history of non-compliance with zoning regulations, the registration and documentation requirements are narrowly tailored and not more extensive than necessary to aid the City in its enforcement efforts.

The City's decision to place the onus on outdoor advertising companies to demonstrate that signs and billboards are entitled to non-conforming use status is a reasonable regulatory choice.[16] The fact that the

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[16] To the extent that DOB Rule 49 simply requires disclosure of factual information that allows the City to determine whether

Clear Channel Plaintiffs have not preserved documents that would allow them to obtain non-conforming use status does not make DOB Rule 49, or the attendant local laws, constitutionally troubling.[17]

Plaintiffs' argument that DOB Rule 49 does not pass constitutional scrutiny because they will simply convert their signs into signs bearing non-commercial copy is unavailing. The City is not required to "make progress on every front before it can make progress on any front." *Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696. Therefore, the City is not required to show that the operation of the local laws and DOB Rule 49 will result in the elimination of every sign improperly claiming non-conforming use status. *See Infinity Outdoor, Inc.*, 165 F.Supp.2d at 417-19. The registration and documentation provisions present a solution that is a "reasonable fit" with the City's substantial interest in achieving compliance with the Zoning Resolution. *See Treadwell*, 294 F.3d at 461-62. That is all that is required.

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outdoor advertising billboards comply with the applicable zoning regulations, our review is more lenient than our review of regulations that restrict accurate commercial speech. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir.2009).

[17] Some signs and billboards most assuredly will not have any documentation. None was ever submitted for those signs erected illegally.

G. Plaintiffs' New York State Constitutional Challenge was Properly Rejected by the District Court

As recognized by the district court, the New York Court of Appeals has construed the provision of the New York State Constitution that pertains to freedom of speech, N.Y. Const. art. I, § 8, as containing language that may be read more expansively than the First Amendment.[18] *See, e.g., O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n. 3, 528 N.Y.S.2d 1, 523 N.E.2d 277 (1988) ("The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment."). As a result, the New York Court of Appeals has, at times, interpreted Article I, § 8 in a manner that is distinct or more protective of free expression than the safe-guards afforded by the First Amendment to the federal Constitution. *See Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248-49, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991) (Kaye, J.); *see also People v. Ferber*, 57 N.Y.2d 256, 259, 455 N.Y.S.2d 582, 441 N.E.2d 1100 (1982) (per curiam). For example, in discussing "[f]reedom of expression in books, movies and the arts," the New York Court of Appeals has held that "the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of [New York's] constitutional guarantee of freedom of expression."

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[18] In relevant part, Article I, § 8 of the New York Constitution states: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain the liberty of speech or of the press."

People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557-58, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986).

We affirm the district court's holding with respect to the Clear Channel Plaintiffs' state law claim to the extent that the court determined that, under the circumstances presented by this case, the New York Court of Appeals has not articulated a stricter standard for regulation of commercial speech than that imposed by the federal Constitution.[19] *See Clear Channel*, 608 F.Supp.2d at 508-09. Indeed, the New York Court of Appeals has explicitly invoked the *Central Hudson* test in evaluating restrictions on commercial speech. *See In re von Wiegen*, 63 N.Y.2d 163, 172-73, 481 N.Y.S.2d 40, 470 N.E.2d 838 (1984); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 147, 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980). Therefore, we affirm the district court's holding that the City's zoning regulations do not offend the New York State Constitution.

IV. CONCLUSION

For the reasons set forth above, we conclude that the challenged provisions of the New York City Zoning Resolution do not impose unconstitutional restrictions on Plaintiffs' commercial speech rights in violation of the First Amendment or the New York State Constitution. We have considered Plaintiffs' remaining arguments, and find them to be without merit. Accordingly, the district court properly

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[19] Even if the category of commercial speech is more narrowly circumscribed under New York law, *see, e.g., N.Y. Pub. Interest Research Group, Inc. v. Ins. Info. Inst.*, 161 A.D.2d 204, 554 N.Y.S.2d 590, 592 (1990), no party disputes that the speech at issue in this litigation is properly defined as commercial speech.

granted summary judgment in favor of Defendants, and its order of March 31, 2009 is hereby **AFFIRMED**.

APPENDIX B

In the
United States District Court
Southern District of New York

Nos. 09-1553, 09-1554

CLEAR CHANNEL OUTDOOR, INC., ATLANTIC OUTDOOR ADVERTISING, INC., SCENIC OUTDOOR, INC., TROYSTAR CITY OUTDOOR LLC, AND WILLOW MEDIA, LLC,

Consolidated-Plaintiffs-Appellants,

v.

CITY OF NEW YORK AND PATRICIA J. LANCASTER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Defendants-Appellees,

EDWARD FORTIER,

Consolidated-Defendant-Appellee.

No. 09-1571

METRO FUEL L.L.C.,

Plaintiff-Appellant,

v.

CITY OF NEW YORK,

Defendant-Appellee,

Decided: March 31, 2009

PAUL A. CROTTY, J., *District Judge*:

BACKGROUND

The factual background applies to both the Clear Channel Plaintiffs and to Metro Fuel. The facts in this section are derived from Plaintiffs' Complaints, the parties' statements of fact submitted pursuant to Local Rule 56.1, the parties' stipulations of fact, and supporting affidavits and exhibits, unless otherwise specified.

I. History of New York City's Regulation of Outdoor Advertising

The claims and issues presented here cannot be fully understood without a brief recitation of the seven-decade history of New York City's regulation of outdoor advertising. The outdoor advertising companies have long ignored or failed to comply with City regulation. They have adopted a variety of tactics, ranging from direct challenges to the City's enforcement efforts in court; waiting until the City's enforcement fever wanes and enforcement efforts again abate; or hoping for a new administration which may have other priorities. These defensive tactics are effective because of the City's sporadic and lackadaisical enforcement of its zoning regulations. Time has worked to the advantage of the commercial billboard companies and the City has, at times, chosen to ignore past transgressions and instead grandfather out-of-compliance signs.

a. Regulation from 1940 to 2001

In 1940, New York City restricted outdoor advertising signs in districts zoned for residential use and in all areas within 200 feet and in view of

arterial highways[1] and City parks larger than one-half acre. (See Declaration of Sheryl Neufeld ("Neufeld Decl.") ¶ 5; Stipulations of Fact ("SOF") ¶ 6, located at Declaration of Eric Hecker ("Hecker Decl.") Ex. 1.) At that time the City Planning Commission ("CDP1") determined that billboard regulation was needed because "[b]illboards and signs not only dominate our business streets ... but they take advantage of every opportunity to crowd in upon public places, established and maintained by public funds, including civic centers, parks, and especially express highways and bridge approaches." (Defendants' ("Def.") Ex. A at 90 (containing Major Reports of the City Planning Commission, 1940).)[2]

The regulations, then and now, distinguish between "accessory use" signs, which are signs located on the premises to which the sign directs attention, and "advertising signs," which are signs

[1] New York City's definition of arterial highways includes more than 70 major expressways, boulevards, parkways, and toll crossings. See N.Y. City Zoning Resolution ("Z.R.") Appx. C: Designation of Arterial Highways. These routes include, for example, Northern Boulevard in Queens, the Harlem River Drive and Henry Hudson Park way in Manhattan, the Jackie Robinson Parkway in Brooklyn, the Major Deegan Expressway in the Bronx, and West Shore Expressway in Staten Island. Id. Essentially every major highway and toll crossing in New York City is an arterial highway. The Court will refer to advertising signs located within 200 feet and within sight of arterial highways as "arterial advertising signs" throughout this Opinion and Order.

[2] Unless otherwise noted, all citations to Defendants' exhibits, declarations, or affirmations refer to exhibits submitted by the City in its case against the Clear Channel Plaintiffs. The Court will specifically note where it is referring to City exhibits submitted in the Metro Fuel case.

that direct attention to a business or service conducted elsewhere. N.Y. City Zoning Resolution ("Z.R.") § 12-10.[3] A sign is not an advertising sign for purposes of the Zoning Resolution if it is an accessory use sign-that is, if it is promoting a business located on the premises. *Id.* Accessory signs are also referred to as "on-site" signs, while advertising signs are also referred to as "off-site" signs. The zoning rules enacted in 1940 distinguished between those two uses because on-site accessory use signs served the valuable economic purpose of identifying the business on the premises. (*See* Def. Ex. A at 90.) The Zoning Resolution permits advertising signs within the Times Square zoning district because signs in that area are "principal and traditional attractions." (*Id.*)

In 1961 the City adopted a comprehensive Zoning Resolution which carried on the general framework from the 1940 regulations. Of relevance to Metro Fuel's challenge, the 1961 Zoning Resolution also added certain sign location and illumination restrictions. Outdoor advertising companies, however, frequently ignored the City's ordinance and erected arterial advertising signs in violation of the zoning regulations. (*See* SOF ¶ 7.) In 1979-80, as the City's fiscal crisis was coming to an end, the City faced a loss of $25 million in federal highway aid, unless it complied with the Federal Highway Beautification Act and enforced provisions of its

[3] The City defines a "sign" as any writing, pictorial representation, emblem, flag, or any other figure of similar character, that "(a) ... is attached to, painted on, or in any other manner represented on a building or other structure, (b) is used to announce, direct attention to, or advertise, and (c) is visible from outside of a building." Z.R. § 12-10

Zoning Resolution. In 1980, after determining that enforcement was economically impracticable, the City grandfathered the outdoor signs that did not comply with the Zoning Resolution but did comply with less restrictive federal and state standards. (*Id.* ¶ 8.) Thus, many signs existing on or before November 1, 1979 were granted "non-conforming use" status and remain exempt to this day from the ban on arterial advertising. *See* Z.R. §§ 42-55, 32-662.

Despite the exemption for pre-1980 signs and the prohibition on additional arterial advertising signs, outdoor advertising companies continued to build illegal signs. Sometimes the billboard companies would obtain accessory-use sign permits and then illegally convert the accessory copy to off-site advertising copy. (SOF ¶ 9; *see also* Affirmation of Mark Geraghty ("Geraghty Affirmation") ¶¶ 32-37.)[4] Other times, the billboard companies would not bother with subterfuge and simply erected signs with no permitting at all. (SOF ¶ 9.) From 1980 until the

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[4] Mark Geraghty, an attorney who has represented outdoor advertising companies since 1991, states that the combination of the "vague definitional provisions" of the Zoning Resolution and "a lack of any serious effort" by the Department of Buildings ("DOB") to dig into the accuracy of the accessory-sign applications led to "a perfect storm," which allowed "liberal interpretations" of the Zoning Resolution by outdoor advertising companies and a situation where "outdoor advertising companies systematically built signs [sic] structures with signs that were almost immediately converted to off-site advertising in plain view of every-one traveling on the City's arterial highways." (*See* Geraghty Affirmation ¶¶ 35-36.) This is a polite way of saying that the billboard companies routinely built illegal signs in order to make money.

late 1990s the City minimally enforced the arterial advertising restrictions. (*Id.* ¶ 10.)

In 1998 the City amended the Zoning Resolution to clarify that non-commercial signs were permitted wherever any other types of signs were permitted.[5] The amendment was enacted in response to a New York State court decision in *City of New York v. Allied Outdoor Advertising, Inc.*, 172 Misc.2d 707, 659 N.Y.S.2d 390 (Sup.Ct. Kings Co.1997), which held that New York could not favor on-site accessory signs over non-commercial signs. Thus, as a result of the 1998 amendments, both on-site accessory-use signs and off-site non-commercial signs were-and currently are-permitted within 200 feet of an arterial highway. Off-site advertising signs are still prohibited in those areas.

b. Recent Regulations: Local Law 14, Local Law 31, and Rule 49

In February 2001, the New York City Council amended the Zoning Resolution to reduce and limit the size of all accessory signs near arterial highways and to establish size, height, and projection requirements for all signs in districts zoned as manufacturing. The purpose of the accessory-sign size limitation was to reduce the incentive for billboard companies to illegally convert accessory

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[5] New York City defines a non-commercial sign as a "sign that contains copy regarding a governmental, charitable, religious, civic, philanthropic and/or educational organization, event or message and that does not prominently or primarily feature or make reference to a for-profit entity and/or its product(s) ...." (*See* Geraghty Affirmation Ex. E (containing New York City Department of Buildings Operations Policy and Procedure Notice # 10/99).)

signs to off-site advertising signs. (*See* Def. Ex. F at 2-5.)

At the same time that it amended the Zoning Resolution, the City Council also amended the Administrative Code to provide for an enhanced enforcement and penalty scheme for sign regulation. Previous fines were so insubstantial that even when the City enforced the Zoning Resolution, the billboard companies absorbed the fines as a cost of doing business. Mayor Giuliani signed the amendment as Local Law 14/2001 ("Local Law 14") on March 19, 2001. Local Law 14 created a registration scheme requiring all outdoor advertising companies to register their arterial signs with the Department of Buildings ("DOB"). (*See* Def. Ex. N §§ 26-253 to 255, 26-260.) As part of the registration process, a company would have to include a certification from a registered architect or engineer, and an officer of the company, stating that all its arterial signs complied with the City's zoning regulations. (*Id.* § 26-261.)

Local Law 14 also created enhanced civil penalties of $15,000 for a first violation of the registration scheme and up to $25,000 per day for subsequent violations, plus criminal penalties and fines. (*Id.* §§ 26-256, 26-262.) The DOB was empowered to bring a special nuisance abatement action to compel removal of an illegal sign or structure, and the DOB was given the power to revoke a company's registration where the company made false statements in the registration application. (*Id.* § 26-260(d).)

None of the provisions of Local Law 14 went into effect until the DOB promulgated a rule. Over the

next two years, the City claims it was unable to promulgate the rule due to delays from litigation over the rules, the events of September 11, 2001, and an internal determination that several provisions of Local Law 14 would be impossible to implement. Thus, in 2003, the City Council again amended the registration requirements. The amendments were relatively minor, but they clarified that outdoor advertising companies were required to provide the DOB with an inventory of all signs within 900 feet and within view of an arterial highway. The amendments were eventually signed into law by Mayor Bloomberg in 2005 as Local Law 31.

As before, Local Law 31 did not take effect until the DOB promulgated a rule, which it did by publishing the proposed rules in the City Record on August 15, 2005. The DOB eventually held public hearings and the regulations-now known as Rule 49-went into effect on August 25, 2006, establishing the registration scheme that the Clear Channel Plaintiffs now challenge.[6] The Court now turns to the precise regulations that the Plaintiffs challenge and the rationale for their claims.

II. The Challenged Regulations

a. The Clear Channel Plaintiffs

The Clear Channel Plaintiffs challenge Zoning Resolution Sections 42-55 and 32-662, the provisions of the Zoning Resolution that ban off-site advertising

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[6] The Court notes that the lack of any substantial activity in the eight years which have passed since Local Law 14 was enacted in 2001 to modernize the 1940 and 1961 zoning regulations is entirely consistent with the billboard industry's delaying tactics and the City's own casual efforts at enforcement.

signs within 200 feet and within sight of arterial highways in manufacturing and commercial districts. The Clear Channel Plaintiffs also challenge the registration and enforcement procedures set forth in Department of Buildings Rule 49, which identifies how DOB will determine whether an advertising sign is a non-conforming use sign, making the sign eligible to carry off-site arterial advertising copy.

The Zoning Resolution provides that within 200 feet of an arterial highway, "(1) no permitted sign shall exceed 500 square feet of surface area; and (2) no advertising sign shall be allowed, nor shall an existing advertising sign be structurally altered, relocated or reconstructed." Z.R. § 42-55 (2001) (governing manufacturing districts); *see also id.* § 32-662 (2001) (governing commercial districts).[7] Plaintiffs estimate that the total number of arterial advertising signs on private property in the City is 634 signs, while the City estimates that the number is at least 692 signs and probably higher. (*See* Declaration of Victor Kovner ("Kovner Decl.") ¶ 7; Declaration of Edward Fortier ("Fortier Decl.") ¶ 24 n. 7.) The Zoning Resolution also grants legal non-conforming use status to arterial signs existing on November 1, 1979.[8] Z.R. §§ 42-55, 32-662.

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[7] This case only involves off-site advertising in non-residential districts. All off-site advertising is banned in residential districts and the Plaintiffs do not challenge that restriction. The Clear Channel Plaintiffs report that they do not possess any billboards along arterial highways in residential areas.

[8] Plaintiffs estimate that up to 150 arterial sign faces fell under the exemption for pre-November 1, 1979 signs when the City granted the exemption (*see* Geraghty Affirmation ¶ 15), but neither party estimates how many signs would still qualify.

Rule 49 amends the Administrative Code to require that all outdoor advertising companies submit an inventory of their signs and sign structures located within 900 feet and within view of an arterial high-way. *See* 1 Rules of the City of New York ("RCNY") § 49-15(a).[9] Advertising companies that submit an inventory which includes non-conforming signs-in other words signs exempted in 1980-must submit documentation establishing that the sign qualifies for non-conforming use status. *Id.* § 49-15(d)(15). As part of that requirement, companies must submit:

Evidence that the non-conforming sign existed and the size of the sign that existed as of the relevant date set forth in the Zoning Resolution to establish its lawful status [i.e. November 1, 1979]. Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date.

Id. § 49-15(d)(15)(b). Further:

Affidavits, Department cashier's receipts and permit applications, without other supporting documentation, are *not sufficient* to establish the non-conforming status of a sign. The submitted evidence must specifically establish the non-conforming aspect of the sign. For example, where

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[9] Even though outdoor advertising companies must submit an inventory of signs within 900 feet of an arterial highway, the only signs barred are the ones within 200 feet and within view of an arterial highway which are not also non-conforming signs, on-site accessory signs, or signs containing non-commercial copy. Signs between 201 and 900 feet must either qualify as non-conforming signs or comply with size restrictions.

evidence is submitted to establish that a sign is a non-conforming advertising sign, proof that the sign was erected, but that does not establish that it was advertising, will not be sufficient.

Id. (emphasis added).

Along with the requirements listed above, outdoor companies must submit an "[a]ffidavit signed by the registered architect or professional engineer, that he or she reasonably believes the sign to be non-conforming based on the evidence submitted." *Id.* § 49-15(d)(15)(c). As part of this affidavit:

A responsible officer of the [advertising company] shall co-sign the affidavit, that he or she reasonably believes the sign to be non-conforming based on the evidence submitted, and that to the best of his or her knowledge there has not been any discontinuance of the non-conforming use for two or more years.

Id. § 49-15(d)(15)(c)(1).

The Clear Channel Plaintiffs challenge these documentary requirements as "draconian and punitive" and claim that many of the required documents will be impossible to produce decades after their creation. Further, the Clear Channel Plaintiffs divine that the City's purpose for the registration requirements is to "eliminate from New York City's arterial highways even the non-conforming signs that had been lawful for decades." (*See* Geraghty Affirmation ¶ 70.)

b. Metro Fuel

Metro Fuel's position is different from the Clear Channel Plaintiffs. It is generally not affected by the restriction on arterial advertising signs, as its signs

are significantly smaller and not situated so as to attract the attention of drivers on arterial highways. Rather, Metro Fuel challenges the aspects of the Zoning Resolution that control where it may place its panel advertisements and how it may illuminate those ads.

While accessory signs can be placed anywhere in commercial and manufacturing districts, subject only to size, height, illumination, and projection limitations, advertising signs are more restricted; those signs may only be placed in large commercial districts, labeled C6-5, C6-7, and C7; and, subject to illumination restrictions, in large commercial and manufacturing districts, labeled C8, M1, M2, and M3. Z.R. § 32-63, 42-52. In the C8, M1, M2, and M3 districts (e.g. Garment District and waterfront areas) advertising signs may only be non-illuminated or indirectly illuminated. *Id.* § 32-645, 42-533. The result of these regulations is that Metro Fuel's advertisement panels, due to their illumination system, may only be placed in the C6-5, C6-7, and C7 large commercial districts. Metro Fuel challenges the pro-visions of the Zoning Resolution that exclude its illuminated panel advertisements from their current locations.

III. The Parties

a. The Clear Channel Plaintiffs

Clear Channel is one of the largest media companies in the world. Clear Channel operates 236 sign faces in New York City. (*See* Stauning Affidavit in Support of Motion for Preliminary Injunction

("Stauning Aff.") ¶ 34.)[10] Eighty-four of these sign faces are arterial sign faces,[11] and Clear Channel derives approximately $10 million in revenue yearly from these signs. (SOF ¶¶ 132, 140.) The arterial sign faces are all illuminated and affixed to buildings or pylons. (*Id.* ¶ 132.) The sign faces range in size from 11,258 square feet (a size equal to one-quarter acre) to 315 square feet, with the majority at either 1,200 square feet or 960 square feet. (*Id.*)

Clear Channel entered the New York market when its parent purchased Universal Outdoor Holdings, Inc., in April 1998, acquiring 34,000 outdoor advertising signs in 23 markets. (*Id.* ¶ 131.) Clear Channel acquired the vast majority of its arterial signs from Universal and the rest through smaller purchases. (*See* Stauning Aff. ¶ 36.) Clear Channel also built one arterial sign structure. (*Id.*) When Clear Channel purchased its signs in New York, it did not perform due diligence on a sign-by-sign basis to determine which signs complied with New York's zoning laws. Instead Clear Channel relied on representations from the sellers that they operated the signs within the law. (SOF ¶ 145.)

The City's enforcement of the Zoning Resolution substantially affects Clear Channel. The vast majority of Clear Channel's arterial sign faces do not

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[10] The Court assumes that the exact number of sign faces regularly varies due to business developments.

[11] In papers filed with the Court, Clear Channel at one point states that it has 95 arterial faces and at another point states that it has 84 arterial faces. (*Compare* Stauning Aff. ¶ 34, sworn on October 23, 2006, *with* SOF ¶ 132, filed July 28, 2008.) The Court will use the number stipulated to by the parties, which is 84 sign faces.

have permits to display advertising-Clear Channel estimates that "at least" 19 of its arterial sign faces should qualify for legal non-conforming use status. (*Id.* ¶ 134.) None of Clear Channel's arterial signs carried accessory advertising as of April 2008, and the signs carry only sporadic non-commercial advertising-for instance, eight sign faces carried non-commercial ads in 2005 and 13 carried non-commercial ads in 2006. (*Id.* ¶¶ 135-39.)

Atlantic Outdoor Advertising entered the New York City outdoor advertising market in 1997 and operates three arterial structures. Atlantic built two of those sign structures. The sign faces vary in size from 1,950 square feet to 1,200 square feet. (*Id.* ¶ 146.) Scenic Outdoor also entered the market in 1997 and operates five arterial sign faces on three structures. Scenic built two of the structures. The sign faces range from 1,200 square feet to 672 square feet. (*Id.* ¶ 147.) Troystar Corporation entered the New York City outdoor advertising business in 1995 and operates nine arterial signs on eight structures. Troystar built two of the structures, and the sign faces range from 5,760 square feet to 420 square feet. (*Id.* ¶ 148.) Willow Media entered the market in 1999 and operates seven arterial signs on four structures. Willow built all four structures. All the signs are 1,200 square feet, except one which is 960 square feet. (*Id.* ¶ 149.)

Atlantic, Scenic, Troystar, and Willow all display advertising copy without permits. The companies generally obtained only accessory-use permits for their sign faces. (*Id.* ¶ 151.) Atlantic, Scenic, Troystar, and Willow have rarely sold non-commercial advertisements on their arterial faces other than for a nominal fee. (*Id.* ¶ 153.)

As for the Individual Defendants, Patricia J. Lancaster was the Commissioner of the New York City DOB at the time the complaint was filed. Edward Fortier is the Director of the Padlock/Sign Enforcement Unit of DOB.

b. Metro Fuel

Metro Fuel operates approximately 440 panel signs in New York City. The panel signs are 69 inches tall by 48 inches wide, or approximately 23 square feet.[12] The panels are internally illuminated, meaning that they contain posters lit from behind by fluorescent bulbs. (*See* Declaration of Michael Freedman ("Freedman Decl.") ¶ 2.) Enforcement of the City's zoning regulations would severely affect Metro Fuel's advertising business because 93% of Metro Fuel's signs are located in districts where internally illuminated advertising signs are prohibited. (*Id.* ¶ 7.)

Metro Fuel places the majority of its panel signs (77%) in or near parking garages, either inside the door to the garage, above or near the door, or attached to the outside of the garage. The remaining panel signs are either attached to the outside of other mixed-use properties or located in parking lots, either mounted on a pole or affixed to an adjacent building. Metro Fuel rents space from the landlord in ex-change for the right to erect these signs. (*Id.* ¶ 3.) It in turn leases that space for advertising at a higher rate than its rental payments. Metro Fuel entered the New York City market in 2006 through

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[12] In their filings, the parties repeatedly refer to Metro Fuel's panel advertisements as 24 square feet in size. If the panels are in fact 69 inches high by 48 inches wide, however, the panels are only 23 square feet in size.

an acquisition of another panel sign company. (See Metro Fuel/City of New York Stipulations of Fact ("Metro SOF") ¶ 1, located in Declaration of Sheryl Neufeld ("Metro Fuel Neufeld Decl.") Ex. L.) Most of Metro Fuel's panel signs do not have permits to display advertising. (*Id.* ¶ 4.)

IV. The Exceptions to the City's Enforcement Scheme

Both the Clear Channel Plaintiffs and Metro Fuel contend that the City's regulatory and enforcement scheme is so riddled with exceptions and inconsistencies as to undermine the very point of the regulations, thus making the relevant aspects of the Zoning Resolution an unconstitutional restraint on speech.

The Court examines the exceptions that the Plaintiffs claim support their cases.

a. Billboards on Government Property

i. Signs on City Property

Despite its own zoning regulations and ban on arterial advertising signs, New York City has utilized arterial advertising on City property. Starting in 1998 the City licensed Clear Channel to display advertising on two 960-square-foot arterial billboards on City property within view of the Belt Parkway in Brooklyn. (SOF ¶ 13.) The City terminated the agreement as of January 1, 2008 and requested that Clear Channel remove the signs. (*Id.* ¶ 14.)

Another exception occurred in 2005 when New York City acquired the "High Line," an inactive rail structure on Manhattan's West Side which had

several arterial billboards. The City negotiated with Clear Channel and with another media company to operate advertisements on those billboards. Following commencement of this litigation, the City declined to execute any agreements, but even so, both Clear Channel and the other media company operated arterial advertising signs on the High Line with the City's permission until July 2007. (*Id.* ¶ 17 23.)

Further, the Yankee Stadium parking lot, which is under the New York City Parks Department's jurisdiction, contains a 1,248-square-foot double-faced arterial billboard. While the application to erect the sign contained assurances that the sign would be used exclusively as an accessory business sign to Yankee Stadium, the billboard contains both off-site advertising copy and non-commercial copy. In 1984 the DOB notified the Yankees that they must eliminate the advertising components of the sign or seek a variance. In light of the billboard industry's conduct, it should come as no surprise that the Yankees complied with neither option-and the City took no further steps to enforce the Zoning Resolution. (*Id.* ¶ 24-26.)

As part of negotiations with the Yankees over the new Yankee Stadium, the City agreed in 2006 to permit the Yankees to operate three additional arterial billboards near the new stadium. As of early January 2009, the Yankees had not erected any of these bill-boards, and the 2006 agreement with the City requires the Yankees to follow zoning laws and regulations. (*See* SOF Ex. H at 23.) In response to a request by this Court, the City specifically confirmed that the new Yankee billboards will be subject to the provisions of the Zoning Resolution restricting off-

site arterial advertising signs. (*See* Jan. 14, 2009 Letter from Sheryl Neufeld ("Jan. 14, 2009 Neufeld Letter") at 3.)

There are two 600-square foot arterial billboards on City-owned property near the West Side Highway at 145th Street. These billboards have been on City land since 1995, but the City recently settled a holdover proceeding and the signs' operator was required to remove the billboards and structures by September 30, 2008.[13] (SOF ¶ 15-16.)

The City also permitted outdoor advertising companies to operate arterial advertising billboards on City land in Staten Island along the West Shore Expressway from 1994 until 2002, and in the Bronx along the Major Deegan Expressway from 2002 until 2008. The City has terminated these agreements. (*Id.* ¶ 27-30.)

Finally, in connection with the City's bid to host the 2012 Summer Olympics, the City, working through a non-profit organization called NYC 2012, required all major outdoor advertising companies to agree to make their billboards available to Olympic sponsors during the Games. (*Id.* ¶ 117-18.) While these bill-boards were not on City land, the negotiated arrangement would have made almost every billboard in the City-including arterial billboards-under the control of a quasi-City agency for a seven-week period.

[13] Upon later inquiries from the Court as to whether these signs had been removed as scheduled, the City reported that it had taken diligent steps to enforce an eviction notice, and that those steps continue. The City now expects the signs to be removed by June 30, 2009.

ii. Signs on MTA, Port Authority, and Amtrak Property

In addition to these signs on City property, there are approximately 75 arterial billboards on property belonging to the Metropolitan Transit Authority ("MTA"), the Port Authority of New York and New Jersey (the "Port Authority"), and Amtrak. (*See* Stauning Aff. Ex. 13.) The parties disagree over the City's reasons for not enforcing its laws on these properties and the City's good faith in prospectively enforcing the Zoning Resolution.

The City did not enforce the Zoning Resolution against the MTA because, City officials claim, they believed that they did not have the authority to do so. (See Declaration of Phyllis Arnold ("Arnold Decl.") ¶ 66; Geraghty Affirmation Ex. F at 2.) City officials held this belief despite a 1982 "Informal Opinion" issued by the New York State Attorney General stating that "the City of New York may provide for the removal of commercial billboards erected in violation of its zoning law on property owned by MTA ...." *See* 1982 N.Y. Op. Atty. Gen. (Inf.) 107, 1982 WL 178319, at *4 (Dec. 28, 1982). In conjunction with this litigation, the City now recognizes that it has the legal authority to enforce the Zoning Resolution against arterial signs on "non-New York City Transit Authority property that is owned or controlled by the MTA (e.g., Long Island Rail Road ("LIRR") and Metro North property)." (*See* Arnold Decl. ¶ 68.) The City apparently cannot enforce the Zoning Resolution against property under the Transit Authority's jurisdiction. (*Id.* ¶ 68 n. 12; N.Y. Pub. Auth. Law § 1204(13-a).) Plaintiffs urge that the City surrendered its authority to do so when it acquiesced in the legislation. Going forward, the City states that

it will enforce the Zoning Resolution against the MTA, with the exception of property controlled by the Transit Authority, in the same manner as it would against private owners. (Arnold Decl. ¶ 69.)[14]

Signs controlled by the Port Authority and Amtrak are in the same position as signs on MTA property. The City claims that for years it mistakenly believed it did not have the authority to regulate those entities, but, in conjunction with these lawsuits, it now believes that it does. Going forward, the City states that it will regulate the Port Authority property-with the exception of the World Trade Center-and Amtrak property in the same manner as private property. (*Id.*)[15]

b. Street Furniture and Phone Kiosk Advertising

The City has a contract with a private company, Cemusa, Inc., to install and maintain bus shelters, automatic public toilets, and newsstands (the "Street Furniture Franchise"). Plaintiffs, primarily Metro Fuel, argue that this contract allows Cemusa to operate advertising displays that are similar to their advertisements, but which are not included in enforcement of the Zoning Resolution.

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[14] There are approximately 28 arterial advertising signs on Transit Authority property and 22 arterial signs on the MTA's LIRR property. (*See* SOF ¶¶ 32, 34.)

[15] There are three arterial advertising signs on Port Authority property and 17 signs on Amtrak property. (*See* SOF ¶¶ 48, 49, 55.) Additionally, there is one arterial sign on U.S. Government property at the U.S. Post Office along the West Side Highway in Manhattan. (*Id.* ¶ 59.) The City states that it will research whether it has authority to enforce the Zoning Resolution against United States property. (*See* Arnold Decl. ¶ 68.)

The City and Cemusa entered into a 20-year Street Furniture Franchise agreement in 2006, under which Cemusa will replace and build up to 3,500 bus shelters, replace at least 284 newsstands, and potentially build another 330 newsstands. (*See* SOF ¶¶ 62, 63, 83.) The new bus shelters may contain up to 55 square feet of back-lit advertising.[16] There is no restriction on displaying such advertisements in any district of the City or within 200 feet and within view of an arterial highway.[17] (*Id.* ¶¶ 65-67.) Many of these new advertisements will contain rotating signs, and other advertisements may use electronic media. (*Id.* ¶ 68.) The Street Furniture Franchise also allows newsstands to bear advertising for the first time, permitting up to 82.5 square feet of advertising. (*Id.* ¶ 83.)

The contract calls for the City to receive at least 50% of gross revenue derived from the Street Furniture Franchise, and more than $1 billion over the 20 years of the agreement due to guaranteed compensation and advertising revenues. (*Id.* ¶¶ 85-87.) The Zoning Resolution's restrictions are not applicable to the street furniture advertising signs. The City states that the Zoning Resolution covers the City's buildings and land, but "does not govern the use or development of the City's streets and sidewalks." (*See* Defendant's Response to Plaintiff's First Consolidated Set of Discovery Demands, at 18, located at Hecker Decl. Ex. 26.) Since bus shelters

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[16] The City permitted old bus shelters to have up to 47 square feet of advertising.

[17] The use of back lighting on the bus shelter advertisement is restricted only in areas prohibited by the regulations of the Landmarks Commission.

and newsstands are on sidewalks, they are not covered by the Zoning Resolution.

Plaintiffs also argue that the City further dilutes the Zoning Resolution's effectiveness by allowing advertisements on phone kiosks, lamppost banners, and taxicabs.

c. Fresh Direct Sign

Plaintiffs point to the Fresh Direct sign, a single billboard advertising the food delivery company along the Long Island Expressway in Queens, as evidence that the City unconstitutionally permits loopholes in its enforcement scheme. The City issued an accessory permit for the digital billboard, which advertises both the food delivery company Fresh Direct and the products sold through Fresh Direct. In 2002, following a DOB enforcement proceeding against the sign's owners for using the billboard for non-accessory purposes, an Administrative Judge ruled that the Fresh Direct sign was an accessory use. The City now states that the sign is an accessory use because 51% of the billboard copy directs attention to the business on the lot, Fresh Direct. (SOF ¶¶ 129-30.)

d. "New York Bus" Exemption

The Zoning Resolution codifies one other exception to the ban on arterial advertising. Zoning Resolution § 42-55(d) grants legal non-conforming use status to signs that are within one-half mile of any of the City's boundaries, were built prior to August 7, 2000, and are along any designated arterial highway that is also:

(1) a "principal route" or "toll crossing" that prohibits direct vehicular access to abutting land

and provides complete separation of conflicting traffic flows; and

(2) a through truck route designated by the New York City Department of Transportation; and

(3) that crosses a boundary of the City of New York.

Z.R. § 42-55(d).

Plaintiffs argue that the City created this narrow exception to exempt the signs belonging to one politically connected businessman who owns billboards along Interstate 95 near New York City's border with Westchester County. Plaintiffs provide evidence that one company, New York Bus Service, Inc., owns eight billboards along I-95 on New York City's northern border. (*See* Stauning Aff. Ex. 42.) The City, however, argues that this exception to the restriction on arterial advertising signs was intended only to "aid New York City outdoor advertisers in maintaining a competitive equality with advertisers that operate immediately outside of the City's boarders [sic]." (*See* Neufeld Decl. ¶ 20.)

V. Procedural History

Clear Channel first filed its complaint against the Defendants on October 6, 2006. Four days later, on October 10, Atlantic Outdoor, Scenic Outdoor, Troystar City Outdoor, and Willow Media filed their complaint against Defendants. The Court consolidated the actions on October 20, 2006, pursuant to Federal Rule of Civil Procedure 42(a). On October 24 and November 1, 2006, respectively, Clear Channel and Atlantic Outdoor, Scenic Outdoor, Troystar City Outdoor, and Willow Media filed motions for a preliminary injunction to prevent the

City from enforcing the arterial advertising restrictions and the provisions of Local Law 14 (2001), Local Law 31 (2005), and DOB Rule 49 (2006). The City subsequently agreed to stay the enforcement of the challenged regulations until the Court resolved the motion for preliminary injunction. Following discovery and the filing of an amended complaint, the City moved for summary judgment on May 12, 2008, pursuant to Rule 56 of the Federal Rules of Civil Procedure. On June 23, 2008, the Clear Channel Plaintiffs cross-moved for summary judgment.

Metro Fuel filed its complaint against the City on September 21, 2007, and this Court accepted the case as related to Clear Channel. Metro Fuel filed a motion for summary judgment or preliminary injunction on July 28, 2008, and the City cross-moved for summary judgment against Metro Fuel on August 25, 2008.[18]

The motions in the cases were fully briefed on October 23, 2008, and the Court held oral argument jointly with the Clear Channel Plaintiffs, Metro Fuel, and Defendants on December 1, 2008.

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[18] On September 19, 2007, the City agreed that it would not enforce the Zoning Resolution against Metro Fuel's then-existing 360 panel signs until 10 days after a decision by this Court. (*See* Metro Fuel Neufeld Decl. Ex. NN.)

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where the record demonstrates that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of producing evidence on each material element of its claim or defense demonstrating that it is entitled to relief. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The evidence on each material element must be sufficient to entitle the movant to relief as a matter of law. *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir.2004).

Once the moving party has made an initial showing that no genuine issue of material fact remains, the nonmoving party may not refute this showing solely by means of "[c]onclusory allegations, conjecture, and speculation," *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 175 (2d Cir.2003) (internal citations and quotations omitted), but must instead present specific evidence in support of its contention that there is a genuine dispute as to material facts. Fed.R.Civ.P. 56(e). The Court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (citing Fed.R.Civ.P. 56(c)).

The same standard of review applies when the court is faced with cross-motions for summary judgment. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir.2001). Each party's motion must be reviewed on its own merits, and the Court must draw all reasonable inferences against the party whose motion is under consideration. *Id.*

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must show that it is likely to suffer irreparable harm without the requested relief, as well as either: (1) a likelihood of success on the merits; or (2) "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir.1985) (citing *Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir.1983)). Where a party seeks to enjoin government action "taken in the public interest pursuant to a statutory or regulatory scheme, however, the moving party cannot resort to the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996) (internal quotations omitted). The party seeking the injunction "must show a 'clear' or 'substantial' likelihood of success where the injunction sought is mandatory - i.e., it will alter, rather than maintain, the status quo." *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir.2004). Because this case involves a City regulatory scheme enacted in the public interest, and because Plaintiffs seek to alter the status quo by preventing the City from enforcing a duly enacted

regulation, Plaintiffs must show a substantial likelihood of success on the merits. *See County of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir.2008) (applying more rigorous "substantial likelihood of success on the merits" standard where county challenged interpretation of new law by Department of Health and Human Services); *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir.2000) (applying higher standard for injunction where plaintiffs challenged the adequacy of emergency housing administered by the New York City Human Resources Administration).

Irreparable harm "means injury for which a monetary award cannot be adequate compensation." *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir.1995) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979)). Additionally, the "[i]rreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Reuters, Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990). A loss of First Amendment rights is generally deemed irreparable harm, particularly where the injury is the result of a government regulation. *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 181 (2d Cir.2006); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir.2003) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."). If the Court were to find Plaintiffs' First Amendment claims credible, it would necessarily have to find that the Plaintiffs suffered irreparable harm. The essential

inquiry in this dispute is whether those First Amendment claims are convincing.[19]

III. Commercial Speech Regulation

The First Amendment, as applied to the states through the 14th Amendment, protects commercial speech from unwarranted governmental regulation.[20] *See Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."). But courts recognize a distinction between commercial speech and other varieties of speech, and typically accord a lesser protection to commercial speech than to other constitutionally guaranteed expressions. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (commercial speech receives "protection somewhat less extensive than that afforded noncommercial speech") (internal quotations omitted); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). Further, "within the class of regulations affecting commercial speech, [courts] accord varying levels of protection depending on the type of commercial speech at issue." *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir.2009). For instance, government restrictions

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[19] To the extent that there are questions about whether the Clear Channel Plaintiffs can make a claim in equity when they may have "unclean hands" in the dispute, the City does not raise this argument.

[20] The First Amendment states that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I.

targeting commercial messages which are either "more likely to deceive the public than to inform it" or "related to illegal activity" survive constitutional scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (citations omitted).

Where a communication is neither misleading nor related to illegal activity, the state must demonstrate its interest in restricting the speech, and the regulatory technique must be in proportion to that interest. *Id.* at 564, 100 S.Ct. 2343 ("Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved ... Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."). In the seminal case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court set out the four-part test to determine the constitutionality of commercial speech restrictions such as the ones challenged here.

The *Central Hudson* test asks the following: (1) is the expression protected by the First Amendment; (2) is the asserted governmental interest substantial; (3) does the regulation directly advance the governmental interest asserted; and (4) is the regulation more extensive than necessary to serve that interest. *Id.* at 566, 100 S.Ct. 2343. The burden is on the government to satisfy the test. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). There is little

dispute here that the first and second factors of the *Central Hudson* test are satisfied. Plaintiffs' challenges deal with the third and fourth prongs.[21] Courts often interchange the elements of these last two prongs, and the Supreme Court has noted that "the last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986)). In other words, the zoning regulation must be reasonable in its relation to its subject and adopted in the public interest.

Before analyzing the Plaintiffs' arguments, the Court discusses how the *Central Hudson* test has been applied in the unique category of billboard regulation and in situations involving "underinclusive" speech restrictions.

a. The Metromedia Decision

In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court considered a sign ordinance that prohibited all outdoor advertising signs except for on-site accessory

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[21] The Clear Channel Plaintiffs conceded at oral argument that they were only challenging the third and fourth prongs of *Central Hudson*. (See Dec. 1, 2008 Clear Channel Oral Argument Tr. ("Clear Channel Tr.") 24:07-11.) Metro Fuel stated at oral argument that it had "a mixed reaction" to the second prong, but it seemed to concede that its strongest objections were on the third and fourth prongs. (*See* Dec. 1, 2008 Metro Fuel Oral Argument Tr. ("Metro Fuel Tr.") 18:17-19:21.)

signs and signs that fell into 12 specified categories.[22] *Id.* at 494-95, 101 S.Ct. 2882. A majority of the Court found that the ordinance did not violate the First Amendment by allowing on-site commercial advertising while forbidding off-site commercial advertising. *Id.* at 511-12, 101 S.Ct. 2882 (finding that San Diego could value one type of commercial speech over another type). Applying the *Central Hudson* test, the Court found that the "serious" question was whether the ordinance passed the third prong-whether the law directly advanced the government's interest in traffic safety and the appearance of the city. *Id.* at 508, 101 S.Ct. 2882. The Court accepted the legislature's judgment that the ordinance improved traffic safety, and the Court found no reason to carefully scrutinize the city's aesthetic desires because there was no claim that San Diego had an ulterior motive in suppressing speech. *Id.* at 509-10, 101 S.Ct. 2882. Finally, the Court found that the "apparent incongruity" of allowing some billboards while rejecting others, when the effect of both is the same on traffic and beauty, did not create a constitutional problem because the city was permitted to value one type of

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[22] The exempted categories included:

> [G]overnment signs; signs located at public bus stops; signs manufactured, trans-ported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and '[temporary] political campaign signs.'

Metromedia, 453 U.S. at 494-95, 101 S.Ct. 2882 (citing the relevant city ordinance).

commercial speech over another, as long as the determination was reasonable. *Id.* at 511-12, 101 S.Ct. 2882 ("underinclusive" ordinance permitted).

A plurality of the Court found that the law violated the First Amendment in two manners. First, the law improperly protected commercial speech over non-commercial speech by granting an exception to on-site accessory signs, but not to non-commercial signs. Id. at 513, 101 S.Ct. 2882 ("Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages."). Second, a plurality found that San Diego could not pick and choose among various types of non-commercial speech based on its content. *Id.* at 514-15, 101 S.Ct. 2882 (finding that if the City allowed some types of non-commercial messages on billboards, it must allow other types of noncommercial messages). The Court overturned San Diego's ordinance because the regulation banned non-commercial advertising signs and thus reached "too far into the realm of protected speech." *Metromedia*, 453 U.S. at 521, 101 S.Ct. 2882.

Metromedia is the flag-bearer for billboard-regulation cases. *Metromedia* stands not just for the proposition that a City may favor on-site accessory advertising and non-commercial off-site advertising over commercial off-site advertising, see, e.g., *Infinity Outdoor, Inc. v. City of New York*, 165 F.Supp.2d 403, 416 (E.D.N.Y.2001) (listing cases); it has also been extensively cited for the theory that "state interests in traffic safety and esthetics may justify zoning regulations for advertising." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789,

808, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *Long Island Bd. of Realtors, Inc. v. Vill. of Massapequa Park*, 277 F.3d 622, 627 (2d Cir.2002) (where purpose of sign ordinance was to "preserve aesthetic value and reduce hazards," it followed that "[o]n their face, such regulations directly advance the Village's interest in aesthetics and safety") (citing *Metromedia*, 453 U.S. at 508-12, 101 S.Ct. 2882).

b. Underinclusive Speech Restrictions: Rubin and Greater New Orleans

Plaintiffs do not contend that *Metromedia* is inapplicable in this case. Instead, Plaintiffs argue that the City's Zoning Resolution fails under the *Central Hudson* test because the City cannot prove what San Diego was able to show in *Metromedia*-that San Diego's underinclusive speech regulation still directly advanced its interests. New York City cannot show this, Plaintiffs argue, because the regulations hypocritically permit some commercial off-site advertising while restricting other commercial off-site advertising, but without a valid basis for the distinction and in such a widespread manner as to undermine the point of the regulations. Specifically, Plaintiffs argue that the City undermines the very point of its Zoning Resolution by allowing commercial bill-boards on City-controlled land and advertisements on franchised bus shelters. To support their position, Plaintiffs rely on two Supreme Court cases that over-turned speech restrictions where the regulations were underinclusive.

In *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999), a federal regulation

prohibited broadcasters from advertising privately owned casinos, but permitted advertising for state-run lotteries or casinos operated by Indian tribes. *Id.* at 176-80, 119 S.Ct. 1923. The Court found that the government regulation was "so pierced by exemptions and inconsistencies" that it could not pass *Central Hudson* 's third prong. *Id.* at 190, 119 S.Ct. 1923. The Court found that the exemptions in the law "directly undermined and counteracted its effects" so as to create "little chance that the speech restriction could have directly and materially advanced its aim," which was to reduce the social costs associated with gambling. *Id.* at 193, 119 S.Ct. 1923 (citations and quotation omitted).

Greater New Orleans built upon an earlier case, *Rubin v. Coors Brewing Company*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), where the Bureau of Alcohol, Tobacco and Firearms ("BATF") banned beer makers from listing the alcohol content on beer labels because, the BATF argued, the ban would prevent "strength wars" among brewers. *Id.* at 478-49, 115 S.Ct. 1585. Applying the third prong of *Central Hudson*, the Court found that the government's regulatory scheme was "irrational[ ]" because, under another set of federal laws, brewers were able to advertise the strength of their alcoholic content. *Id.* at 488, 115 S.Ct. 1585. The inconsistency of the laws created "little chance" that the regulation at issue could directly advance the government's purpose. *Id.* at 489, 115 S.Ct. 1585. Secondly, the Court found that the regulation did not pass the fourth prong of *Central Hudson* because the government had other regulatory options that were less intrusive to the defendant's First Amendment rights. *Id.* at 491, 115 S.Ct. 1585.

Plaintiffs argue that the principles of *Greater New Orleans* and *Rubin* govern this case. While Plaintiffs agree that *Metromedia* allows for some underinclusiveness in laws regulating speech, they argue that the City's Zoning Resolution restricting arterial advertising and panel advertising is so hypocritical that it pushes the regulations into the realm of *Greater New Orleans* and *Rubin*.

The Court now turns to its analysis of the Clear Channel Plaintiffs' and of Metro Fuel's claims.

IV. Application to Clear Channel Plaintiffs

The Clear Channel Plaintiffs challenge: (1) the provisions of the Zoning Resolution that ban off-site advertising signs within 200 feet and within sight of arterial highways in manufacturing and commercial districts; and (2) the registration provisions of DOB Rule 49. Both regulations involve a restriction on speech and fall under the *Central Hudson* analysis. Because the challenge to the registration provisions of Rule 49 also involves a preliminary matter-whether the claim is ripe for review-the Court analyzes each challenge individually.

a. Arterial Advertising Ban

Under *Central Hudson* 's first prong-whether the First Amendment protects the expression-neither party disputes that off-site arterial advertising is protected. The advertising at issue is not deceptive and it does not promote illegal activity; it is protected commercial speech. *See Central Hudson*, 447 U.S. at 563-64, 100 S.Ct. 2343. Nor do the Clear Channel Plaintiffs argue that the City fails to satisfy the second prong, that the City's asserted interests are substantial. The City's interests in promulgating the

restrictions on arterial advertising are to improve traffic safety and aesthetics, as evidenced by the discussions in the City Planning Commission's 1940 report on the zoning amendments (*see* Def. Ex. A at 90), by the CDP1's 2000 report on the Zoning Resolution (*see id.* Ex. F at 2), and by Mayor Giuliani's statements when signing Local Law 14 (*see id.* Ex. O at 3-4). There is ample case law establishing that traffic safety and aesthetics constitute substantial government interests. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 807, 104 S.Ct. 2118; *Metromedia*, 453 U.S. at 507-08, 101 S.Ct. 2882. The real issues are *Central Hudson* 's third and fourth prongs.

In analyzing *Central Hudson* 's third element-whether the regulation directly advances the asserted governmental interest-this Court must determine how much underinclusivity is permitted in the arterial advertising regulations before the regulations fail to materially advance the City's interests. There is little question, however, that without taking into account the exceptions that the Plaintiffs highlight, the City's regulations directly and materially advance the City's interests. In the billboard industry's challenge to the same arterial ban in 2001, Judge Gershon of the Eastern District of New York held that the City's regulation directly and materially advanced the City's interest. *See Infinity Outdoor*, 165 F.Supp.2d at 417. Although the posture of that challenge was different because the Plaintiff argued that the City's arterial advertising ban violated the First Amendment by banning advertising signs but permitting noncommercial signs, the regulations at issue were the same. Judge Gershon applied *Central Hudson* and, under the third prong, held that both the history of the City's

zoning laws and "the 'accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety' is sufficient to satisfy the third step of *Central Hudson*." Id. (quoting *Metromedia*, 453 U.S. at 509, 101 S.Ct. 2882).[23]

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[23] The Clear Channel Plaintiffs claim that even without the exceptions, the arterial advertising restrictions would not materially advance the City's interests because the out-door advertising companies would transfer any illegal advertising signs into non-commercial signs, thus making the signs le-gal. Clear Channel argues that it accomplished such a transition with 400 signs in Houston in 2003 when that city enacted a similar law. (*See* Affidavit of Michelle Costa ("Costa Aff.") ¶¶ 6-10.) Even though the revenue from non-commercial advertising is lower, Clear Channel argues that the high cost of removing billboard structures makes it more economical to convert signs to non-commercial copy and earn additional revenue by charging phone companies rent to post antennae on the structures. The *Infinity* court rejected this "heads-I-win-tails-you-lose" economic cost-benefit argument, 165 F.Supp.2d at 418-19, and this Court does as well. The City presents evidence that the CDP1, in amending the Zoning Resolution in 2001, considered the proliferation of vinyl advertising signs, which are relatively easy to install and dismantle. (*See* Def. Ex. F at 2-4.) It makes sense that many of these signs would be removed and not converted to non-commercial copy if the arterial ban was upheld. Additionally, Clear Channel's history of posting noncommercial copy in New York City is not a robust one. Eight of Clear Channel's arterial billboards carried noncommercial ads in 2005, and 13 arterial billboards carried such ads in 2006. As of April 2008, no Clear Channel arterial billboard carried non-commercial copy. But even if the Court put stock into Clear Channel's conversion argument, Supreme Court precedent directs this Court to also give weight to the common-sense judgment of legislators that their restrictions on speech will have the desired effect. *See Lorillard Tobacco*, 533 U.S. at 555, 121 S.Ct. 2404; *Metromedia*, 453 U.S. at 509, 101 S.Ct. 2882.

The Plaintiffs claim that the numerous exceptions to the Zoning Resolution riddle the entire regulatory structure-the exceptions swallow the rule. The Court now turns to whether these supposed inconsistencies fatally compromise the City's scheme for regulating arterial advertising signs.

Greater New Orleans and *Rubin* hold that "self-defeating speech restrictions will violate the First Amendment." *See Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 906 (9th Cir.2009) (citing *Greater New Orleans*, 527 U.S. at 190, 119 S.Ct. 1923). But those two cases involved the content of the speech allowed (advertising for gambling allowed and prohibited; strength of alcohol content allowed and prohibited) and not the location of the message. This case involves regulation of billboard location, not the content of the speech. As *Metromedia* discusses and makes clear, the law of billboard regulation is distinct from other speech regulation. *See Metromedia*, 453 U.S. at 501, 101 S.Ct. 2882 ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."); *see also N.Y. State Rest. Ass'n*, 556 F.3d at 132 ("[W]ithin the class of regulations affecting commercial speech, we accord varying levels of protection depending on the type of commercial speech at issue."). To demonstrate how the principles of *Greater New Orleans* and *Rubin* apply to billboard regulation, the Plaintiffs rely on two District Court cases from Los Angeles: *World Wide Rush, LLC v.*

Here, New York City has ample reason to believe that its arterial restrictions will directly impact the number of arterial advertising signs in the City, and that these signs will not overwhelmingly be transferred to non-commercial copy.

City of Los Angeles, 563 F.Supp.2d 1132 (C.D.Cal.2008), and *Metro Lights, LLC v. City of Los Angeles*, 488 F.Supp.2d 927 (C.D.Cal.2006). Plaintiffs strongly urged the Court to accept *Metro Lights* as correct, but, unfortunately for Plaintiffs, it was reversed on appeal. *See Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir.2009).[24]

In *World Wide Rush*, the District Court found that a Los Angeles regulation banning off-site advertising signs within 2,000 feet of a freeway failed the *Central Hudson* test because the city "permitted multiple commercial signs" within 2,000 feet of a free-way, undermining the city's interests in traffic safety and aesthetics. 563 F.Supp.2d at 1152. The court found that Plaintiffs showed three instances where the city permitted "giant commercial billboards" to stand within 2,000 feet of a freeway, and the court held that this was enough to satisfy the undermining standard of *Greater New Orleans*. *Id*. at 1150-51.

Plaintiffs urge this Court to follow *World Wide Rush*, where there appeared to be significantly fewer exceptions to the billboard ban than exist in this case. Assuming that *Greater New Orleans* has any

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[24] At oral argument Plaintiffs also presented the Court with a third California case which they claim supports their position, *Metro Fuel, LLC v. City of San Francisco*, No. C 07-06067 JSW (N.D.Cal. Nov. 12, 2008). Plaintiffs handed the Court a "Notice of Tentative Ruling and Questions" from that case, which Plaintiff Metro Fuel described as a common practice of West Coast courts to provide a tentative ruling in advance of argument, listing questions the parties should address at the hearing. This notice is by nature only a tentative decision, and the Court fails to see its precedential value to this case. The Court does not take the notice into account.

applicability in the billboard world, it was applied far too strictly. The *World Wide Rush* court found that "preserving even one freeway-facing sign still undermines the City's stated interests in traffic safety and aesthetics." *Id.* at 1151. This all-or-nothing approach misinterprets the reasoning of *Greater New Orleans*, which overturned the commercial speech restriction there because one part of the regulatory regime permitted certain content while another part banned the same content. Obviously the regime was internally contradictory. Further, banning billboards within 2,000 feet of Los Angeles' freeway system is not at all like the much shorter 200-foot level specified in the City's Zoning Resolution. Finally, as Ralph Waldo Emerson famously said, "A foolish consistency is the hobgoblin of little minds," and the First Amendment does not mandate perfect consistency. *See, e.g., Trans Union Corp. v. Fed. Trade Comm'n*, 267 F.3d 1138, 1141 (D.C.Cir.2001) (restriction on target marketing not unconstitutional under *Greater New Orleans* where law had "just one exception"); *Paradigm Media Group, Inc. v. City of Irving*, No. 3:01-CV-612-R, 2002 WL 1776922, at *7 (N.D.Tex.2002), *aff'd*, 65 Fed.Appx. 509 (5th Cir.2003) (sign ordinance banning off-site advertising signs with exception for signs at two sports facilities not an unconstitutional restraint on speech). *Greater New Orleans* holds that when the regulation at issue is riddled by exceptions, contradictions, and internal inconsistencies as to what content can be delivered, it no longer passes constitutional muster. But that is not even remotely the case here, and the Court declines to follow *World Wide Rush's* overly strict reading of underinclusivity.

The second Los Angeles District Court case that Plaintiffs rely on is *Metro Lights*, 488 F.Supp.2d 927,

which the Ninth Circuit overturned subsequent to the briefing and oral argument in this case. *See Metro Lights*, 551 F.3d at 914. The District Court in *Metro Lights* found that under *Greater New Orleans*, Los Angeles could not ban commercial off-site signs while creating an exception for advertisements on city-controlled street furniture. 488 F.Supp.2d at 931-32. The Plaintiff in that case was a panel advertising company much like Plaintiff Metro Fuel, and Los Angeles' street furniture program was substantially similar to New York City's agreement with Cemusa. *Id.* at 933, 935-36. The Clear Channel Plaintiffs and Metro Fuel, in particular, naturally placed great reliance on the District Court decision, and urged the Court to follow its logic. On January 6, 2009, however, the Ninth Circuit overturned the decision on several grounds. *See Metro Lights*, 551 F.3d at 908-11.[25] In doing so the Ninth Circuit shredded the logic of the District Court's decision.

First, the Ninth Circuit stated that in *Metromedia*, the Supreme Court allowed San Diego to restrict all off-site advertising, but permitted an exception for such advertising on bus-stop benches. *Id.* at 908-09. Thus, since *Metromedia* had allowed an exception for ads on bus shelters, it followed that Los Angeles' ordinance, which also permitted such an exception for the street furniture franchise, was permissible. *Id.* at 909 ("[W]e must conclude that *Metromedia* is essentially indistinguishable from this case insofar as the challenged ordinances, in their commercial applications, are concerned."). Further,

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[25] Upon the Plaintiffs' request the Court allowed the Clear Channel Plaintiffs, Metro Fuel, and the City to submit supplemental briefs on the impact of the Ninth Circuit's decision.

the Ninth Circuit held that *Metromedia* allowed Los Angeles to value one type of speech-"controlled offsite advertising on public transit facilities"-more than another type of speech-"uncontrolled offsite advertising spread willy-nilly about the streets." *Id.* at 910.

Most relevant to the Clear Channel Plaintiffs, the Ninth Circuit held that the ordinance was not so inconsistent as to fail under *Greater New Orleans*. *Id.* at 911. *Greater New Orleans* did not apply because Los Angeles' street furniture franchise "allows the City to put a firm cap on the quantum of advertising it allows," and "does not work at inexorable cross-purposes to" Los Angeles' goals of traffic safety and aesthetics. *Id.* Importantly, the court found that "[a]lthough the [street furniture franchise] permits some advertising, a regime that combines the Sign Ordinance and the [franchise] still arrests the uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter, which the City believed to be a worthy legislative goal." *Id.* The Ninth Circuit thus upheld the principle that not all exceptions to a speech regulation force the regulation to fail under *Central Hudson* prong three.

The Court returns to the crucial question: is New York City's arterial advertising restriction so pierced by inconsistent application that it fails to directly advance the City's traffic and aesthetic goals? The Court finds that the exceptions, limited in their number and still being reduced, do not so undermine the Zoning Resolution. As a result of the Zoning Resolution the Clear Channel Plaintiffs will be forced to remove-or convert to non-commercial copy-dozens of large, distracting billboard signs near arterial

highways which should never have been erected in the first place. Billboards belonging to other outdoor advertising companies not parties to this case will presumably also come down. The City has stated that it will enforce the Zoning Resolution against the MTA, Port Authority, and Amtrak, where the law allows, and against itself, so many more arterial advertising billboards should also be removed. Enforcement of the Zoning Resolution will further prevent the illegal erection of future arterial advertising structures and signs. It must also be recalled that the City is enforcing a regulation which has been routinely ignored by the industry. The industry has been on notice of the new law since 2001. After eight years notice it cannot claim surprise.

The exceptions and inconsistencies in this case simply do not undermine the Zoning Resolution to the point of unconstitutionality. As an initial matter, the Court considers signs on the street furniture, phone kiosks, lampposts, and other similar structures wholly distinct in comparison to the Clear Channel Plaintiffs' billboards. *Metromedia* allows the government to value one type of commercial speech over another. *See Metromedia*, 453 U.S. at 512, 101 S.Ct. 2882. Likewise, the Ninth Circuit in *Metro Lights* recognized that Los Angeles had a valid interest in permitting "controlled offsite advertising on public transit facilities" while banning "uncontrolled offsite advertising spread willy-nilly about the streets," and thus allowed the city to distinguish between two types of advertising that, on their face, seemed similar in kind. *See Metro Lights*, 551 F.3d at 910-11.

Here, the advertisements on street furniture, lamp-posts, taxicabs, and phone kiosks are a different type of commercial speech and are located in a different manner than the giant billboards controlled by the Plaintiffs, which are located to capture roadway eyes. Not only are the street furniture advertisements significantly smaller than the billboards, but they target a different class of consumer-one who is walking on City streets rather than driving on an arterial high-way. Further, this category of commercial speech, particularly in respect to the Street Furniture Franchise, is an advertising medium subject to the aesthetic control of the City because of the contract with Cemusa. It is entirely appropriate for the City to value a category of commercial speech that has a consistent appearance and relatively small size. It may be said to create harmony in an otherwise chaotic streetscape. That goal is entirely praiseworthy and does not undermine the City's ability to restrict the uncontrolled proliferation of large billboards. *See id.*[26] Accordingly, the Court does not consider the Street Furniture Franchise and other related signs when looking at the full range of exceptions to the arterial advertising ban.

Assuming full enforcement of the City's laws, the arterial advertising signs that will remain are signs

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[26] Kerry Gould-Schmit, the former Assistant Commissioner for the Coordinated Street Furniture Franchise, asserts in a declaration that one of the goals of the City's Street Furniture Franchise is to eliminate the lack of coordination and poor maintenance of street furniture in the City. (*See* Declaration of Kerry Gould-Schmit ("GouldSchmit Decl.") ¶¶ 6-8; *see also* Def. Ex. KK at 6, 24, 26.)

still grandfathered from 1980;[27] the signs within one-half mile of the City's border on certain specified highways; and signs that the City has no jurisdiction to regulate, such as signs on Transit Authority property, signs on the property of the Port Authority at the World Trade Center, and perhaps signs on U.S. Government property. The combined exceptions to the arterial advertising restriction number far less than the 634 arterial advertising signs that Plaintiffs estimate currently exist on private property. (*See* Kovner Decl. ¶ 7.) The City's scheme is not perfect, and it is not without some exceptions, but those exceptions are relatively few and still declining, amounting to only a small percentage.

The adequacy of the City's regulatory scheme becomes particularly clear when comparing the exceptions here to the ones found unconstitutional in *Greater New Orleans* and *Rubin*. In *Greater New Orleans* the speech regulation was contradictory because it banned all broadcast advertising about privately operated casinos but allowed such advertising about tribal-operated casinos and government-operated casinos. 527 U.S. at 190, 119 S.Ct. 1923. In *Rubin* the Court pointed out the "overall irrationality" of the government's regulatory scheme because, among other exceptions, it prohibited the display of alcohol content on labels while allowing it in advertising. 514 U.S. at 488, 115

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[27] As stated previously, the parties do not submit information about how many signs grandfathered in 1980 still qualify for legal non-conforming use status. As a possible example, the Court notes that Clear Channel, one of the largest outdoor advertising companies in New York, estimates that "at least" 19 of its sign faces will qualify for legal non-conforming use status. (*See* SOF ¶ 134.)

S.Ct. 1585. In both cases the exceptions in the regulations worked at diametrically opposing purposes to the regulations' stated goals. Here, the City is not favoring one type of content over another. Off-site advertising signs are generally permissible, except when located in close proximity to the City's arterial highways and parkways. The exceptions to this location rule are relatively few: signs that are either grandfathered, or outside of the City's regulatory jurisdiction, or signs of a wholly different size and type. Looking at the arterial advertising restrictions in the context of the entire scheme, as this Court must, *see Greater New Orleans*, 527 U.S. at 192, 119 S.Ct. 1923, the scheme is not inconsistent and does not undermine the City's goals of traffic safety and aesthetics. Even with the few exceptions outlined by the Plaintiffs, the regulation directly advances the City's asserted interest and thus satisfies the third prong of *Central Hudson*.

It is also worth noting that while the Clear Channel Plaintiffs are certainly engaged in protected speech, this challenge is not motivated by an abstract concern about First Amendment rights as much as it is by a very real concern that Plaintiffs' financial prospects will be adversely impacted. Even with a fully enforced arterial advertising ban, the Clear Channel Plaintiffs will be able to host billboards in large areas of the City. (*See* SOF ¶¶ 141, 154.) The arterial advertising ban does not diminish the Plaintiffs' ability to speak; it only limits the location of the speech to an area less desirable to the Plaintiffs because their rates will presumably have to be reduced.

Before moving onto the fourth prong of *Central Hudson*, the Court reviews the Clear Channel

Plaintiffs' three alternative arguments that the arterial advertising restrictions fail to directly advance the City's interest. First, Clear Channel argues that the restrictions will not work because the company will transfer its sign faces to non-commercial copy. The Court has already discussed and dismissed this "heads-I-win-tails-you-lose" argument. See Discussion Section IV(a), *supra* p. 497 n. 23.

Second, the Clear Channel Plaintiffs argue that the exceptions uniformly and unconstitutionally favor the Government. Certainly, government cannot exempt itself from the speech restrictions it imposes on private parties. *See Nichols Media Group LLC v. Town of Babylon*, 365 F.Supp.2d 295, 316-17 (E.D.N.Y.2005) (finding that the town signs "must be subject to the same requirements as signs sought to be erected by non-governmental entities"). Plaintiffs argue that the Cemusa Street Furniture Franchise gives the City a broad financial incentive to exclude private advertisers for competitive reasons. As previously discussed, the City may value one category of commercial speech over another where it has valid reasons for doing so. *See Metromedia*, 453 U.S. at 511-12, 101 S.Ct. 2882. The Court has already explained why the signs in the Street Furniture Franchise are of a different type than the billboards owned by the Clear Channel Plaintiffs. The City is free to value a controlled and harmonious streetscape without compromising its ability to restrict uncontrolled and obtrusive advertising on the City's arterial road network. This is not a situation where the City is exempting its signs while banning the Plaintiffs' signs of the same type. The City has stated that it will enforce the Zoning Resolution against all billboards on City and

government property, where it is empowered and authorized to do so. That is sufficient to satisfy the Court that the regulations treat City-owned billboards in the same manner as privately owned billboards.

Third, the Clear Channel Plaintiffs argue that the City must show, through actual evidence, that its regulations will in fact materially advance its interests in traffic safety and aesthetics. The Plaintiffs argue that the City has failed to present any study linking a ban on billboards to improvements in traffic safety or aesthetics, and, further, that the City's history of underenforcement of the Zoning Resolution, as well as the grandfathering of signs in 1980 and the issuance of building permits between 1979 and 1999 for large accessory signs along arterial highways, show that the City puts little value on its stated interests. The Clear Channel Plaintiffs cite *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), for the proposition that the burden of justifying a restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71, 113 S.Ct. 1792. Courts dealing with billboard regulation, however, have routinely found that aesthetics and traffic safety are valid reasons to restrict billboard placement, even without further studies backing the efficacy of the regulation. *See Metromedia*, 453 U.S. at 510, 101 S.Ct. 2882 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic

harm.' "); *see also Ackerley Commc'ns of the Northwest v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir.1997) ("As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests."); *Nichols Media Group*, 365 F.Supp.2d at 309 ("This court and others have agreed that a ban on off-site commercial speech directly advances the governmental interests of safety and aesthetics."); *Infinity Outdoor*, 165 F.Supp.2d at 417. It is a matter of common sense, precedent, and, in this case, legislative determination that the Zoning Resolution will improve both the City's aesthetics and its traffic safety. *See Vill. of Massapequa Park*, 277 F.3d at 627 ("Municipalities and other government bodies have considerable leeway ... in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech.") (internal quotation and citations omitted); *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, No. 01-CV-556A(M), 2008 WL 781865, at *24 (W.D.N.Y. Feb. 25, 2008) ("[I]t is not for [the court] to second-guess the legislative judgments by the Town.").

As for *Central Hudson* 's fourth element, whether the regulation is more extensive than necessary to serve the City's interest, courts typically examine whether the regulation is narrowly tailored and if the proponents of the regulation "carefully calculated" the costs and benefits associated with the burden on speech. *See Greater New Orleans*, 527 U.S. at 188, 119 S.Ct. 1923 ("The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow

tailoring of the challenged regulation to the asserted interest-a fit that is not necessarily perfect, but reasonable.") (quotations and citations omitted).

The Clear Channel Plaintiffs argue that the City could pass less drastic regulations that would still satisfy its goal of preventing uncontrolled proliferation of billboards along the arterial roads. The Plaintiffs suggest limiting the regulations to apply only to new construction, creating spacing restrictions between signs, or even enforcing the restrictions only against structures located in zones where large bill-boards clash with the appearance of the surrounding area. Besides the fact that this approach would allow Plaintiffs to keep many of their ill-gotten gains, nothing mandates that the City must consider what the Plaintiffs claim is a better idea-or one that would have less impact on the billboard industry. *Central Hudson* 's fourth prong requires that the regulation be a reasonable fit with the City's goals, or "a means narrowly tailored to achieve the desired objective." *Lorillard Tobacco*, 533 U.S. at 556, 121 S.Ct. 2404; *see also Vill. of Massapequa Park*, 277 F.3d at 627. The City need not use the least restrictive means, nor must it select the very best alternative. The regulation must be a fit with the City's goals, and "[w]ithin those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Bd. of Trs. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court found that a regulation banning advertising for smokeless tobacco or cigars within 1,000 feet of a school failed under *Central Hudson* 's fourth prong because the reach of the regulation was overly

inclusive: approximately 90% of Boston, Worchester, and Springfield, Massachusetts would be off-limit to such advertising. 533 U.S. at 561-62, 121 S.Ct. 2404. There is no such concern with New York City's Zoning Resolution in this case. The City seeks only to prohibit off-site advertising signs within 200 feet and within view of arterial highways. In contrast to the Clear Channel Plaintiffs' arguments, the arterial advertising restriction fits the City's twin goals of traffic safety and aesthetics, while providing ample opportunities for the Plaintiffs to host their advertisements in other areas of the City. *See Infinity Outdoor*, 165 F.Supp.2d at 417 (finding that the same regulations passed *Central Hudson* 's fourth prong because the Zoning Resolution "prohibits off-site commercial signs only where they cause the most aesthetic and traffic safety problems: near highways and parks, in residential neighborhoods, and in certain commercial districts"). The Zoning Resolution is sufficiently narrow, leaves ample room for outdoor advertising, and is a reasonable "fit" with the City's goals to satisfy the fourth step of *Central Hudson*.

b. Rule 49 Provisions

Plaintiffs challenge Rule 49's registration requirements for outdoor advertising companies seeking to qualify their signs for non-conforming use status. As outlined earlier, in 1980 the City grandfathered off-site advertising signs built and used prior to November 1, 1979. These signs received legal non-conforming use status. Portions of Rule 49 set the parameters for how outdoor advertising companies prove that a sign retains its non-conforming use status, thus making it eligible to carry off-site arterial advertising.

The Clear Channel Plaintiffs argue that the provisions of Rule 49 fail under prongs three and four of *Central Hudson*. The City disagrees, and urges that the Clear Channel Plaintiffs' First Amendment argument is premature because it is not ripe for review.

i. Ripeness

Ripeness refers to whether a court has jurisdiction to hear a dispute. Jurisdictional questions contain two overlapping ripeness issues, and "[b]oth are concerned with whether a case has been brought prematurely." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir.2003). The first issue is constitutional ripeness, which refers to the basic requirement under the Case or Controversy Clause of Article III that the question at issue emanate from an actual dispute. *Id.* Constitutional ripeness is not in question in this matter, as the parties have an actual dispute over the constitutionality of the Rule 49 procedures.

The second issue is prudential ripeness; a court does not have jurisdiction over a dispute if "the case will be *better* decided later and [ ] the parties will not have constitutional rights undermined by the delay." *Id.* (emphasis in original); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) ("[The ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging

parties."). The determination of prudential ripeness triggers a two-step inquiry, evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507. This determination involves a "pragmatic balancing of those two variables and the underlying interests which they represent." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C.Cir.1986).

The fitness analysis is "concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *Simmonds*, 326 F.3d at 359 (quoting *Isaacs v. Bowen*, 865 F.2d 468, 478 (2d Cir.1989)). A claim is not ripe where it is directed "at possibilities and proposals only, not at a concrete plan which has been formally promulgated and brought into operation." *Bowen*, 865 F.2d at 477. The claim may also fail for ripeness when a plaintiff has not exhausted administrative remedies and judicial review would be benefitted by waiting for the agency's views on how best to interpret the agency's regulation. *See Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 440 (2d Cir.2003). Conversely, an issue may be ripe where it "would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir.2008) (quoting *Simmonds*, 326 F.3d at 359).

Taken together, the fitness analysis requires "consideration of a variety of pragmatic factors: whether the agency's actions or inactions challenged in the law suit are 'final;' whether the issues presented for review are primarily legal as opposed

to factual in nature; and whether administrative remedies have been exhausted at least to the extent that an adequate factual record has been established." *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 26 (2d Cir.1984) (citing *Abbott Labs.*, 387 U.S. at 149-51, 87 S.Ct. 1507).

The hardship analysis, the second step of the ripeness review, examines "whether and to what extent the parties will endure hardship if the decision is withheld." *Simmonds*, 326 F.3d at 359. The mere possibility of hardship is not enough to make a case ripe; instead, the courts must ask "whether the challenged action creates a direct and immediate dilemma for the parties." *N.Y. Civil Liberties Union*, 528 F.3d at 134 (citation omitted).

Courts use a "somewhat relaxed" hardship analysis where the controversy involves a facial First Amendment challenge. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir.2002); *see also New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir.1995) ("The primary reasons for relaxing the ripeness analysis in this context is the chilling effect that potentially unconstitutional burdens on free speech may occasion."); *Sanger v. Reno*, 966 F.Supp. 151, 161 (E.D.N.Y.1997) ("In the context of a First Amendment facial challenge to the validity of a statute, reasonable predictability of enforcement or threats of enforcement even where enforcement is not impending are sometimes enough to ripen a claim ... However, courts have uniformly insisted, even in the First Amendment context, that there must still exist some credible fear of enforcement.") (citations omitted).

Applying the law to the Clear Channel Plaintiffs' challenge, it is clear that their claim is ripe. Rule 49 was promulgated in 2006. The provisions of the Rule governing sign registration are not speculative or unknown. If found constitutional, the Rule will almost immediately apply to the Clear Channel Plaintiffs. The City argues that any harm to the Plaintiffs is "hypothetical" because the DOB has not yet completed a review of the Plaintiffs' applications for non-conforming status, so it is unclear how the DOB will interpret Rule 49's provisions. The City also argues that the Clear Channel Plaintiffs do not face an immediate harm because their signs will remain standing until the DOB completes its review, and, if the DOB finds the sign noncompliant, the Plaintiffs may challenge the determination through an administrative appeals process.

The Court is not persuaded. First, the constitutionality of Rule 49 is a legal question. The Court can look at the provisions of Rule 49 and determine, on their face, whether they are constitutional; the Court needs no further factual development. Second, the Rule is final. There is no indication that it will undergo any further revision. Third, the Plaintiffs face an immediate hardship if Rule 49 is upheld. There is more than a "credible fear" that the City will enforce the provisions of Rule 49 against the Clear Channel Plaintiffs; the City has been trying to enforce similar provisions since 2001. The Plaintiffs' challenge is fit for review and the Plaintiffs face an immediate hardship if the law is upheld. Accordingly, the Clear Channel Plaintiffs' challenge is ripe.

ii. First Amendment Challenge

The Clear Channel Plaintiffs base their First Amendment challenge on *Central Hudson* 's third and fourth prongs. On the third prong, the Clear Channel Plaintiffs make some of the same arguments they made when challenging the arterial advertising restriction. They state that Rule 49's documentation requirements do not materially advance the City's interests because the City cannot reasonably claim that 29-year-old signs cause traffic safety problems or that enhanced documentary requirements will reduce the problem. The Clear Channel Plaintiffs state that they will simply replace the commercial copy with non-commercial copy, thus thwarting the City's goals. On the fourth prong, the Clear Channel Plaintiffs argue that the regulations are not narrowly tailored because they place the burden of proof on the outdoor advertisers to establish that the signs are non-conforming, and force them to prove this with evidence almost impossible to provide given the passage of time. Further, they argue that the City could establish less stringent documentation policies that still meet the City's goals.

Section 49-15(d)(15) states that to register a sign as non-conforming, an outdoor advertising company must present: evidence that the sign existed as of November 1, 1979; evidence of the size of the sign at that time; and evidence that the sign carried advertising copy at that time. *See* 1 RCNY § 49-15(d)(15)(b). "Acceptable evidence" under the provision includes "permits, sign-offs of applications after completion, photographs and leases," while "[a]ffidavits, Department cashier's receipts and

permit applications, without other supporting documentation, are not sufficient ...." *Id.*[28]

The City argues that the regulations as written serve several important ends. First, by placing the burden of proof on the outdoor advertisers to prove non-conforming status, the DOB aids enforcement efforts by establishing a reliable list of legal non-conforming use signs. Second, by requiring documentation as to a sign's size and location, the DOB can more easily discover if a sign has lost its non-conforming use status due to changes in its location or surface area. The City states that its evidentiary requirements are necessary because documents like affidavits, cashier's receipts, and permit applications are less reliable as proof of non-conforming status, while documents like permits, sign-offs of applications after completion, photographs, and leases are "credible, contemporaneous records." (*See* Arnold Decl. ¶ 40.) Rule 49 does not preclude use of the supposedly less-reliable evidence, it simply requires that advertisers support less-reliable evidence with more-reliable evidence.[29]

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[28] The Court recognizes that providing this type of evidence may be a burden, but it is a common one in the zoning world where prior non-conforming uses must be proven by the person claiming the benefit of the non-conforming use.

[29] The DOB considers affidavits, cashier's receipts, and permit applications as less-reliable evidence of a sign's non-conforming use status because "they do not establish that an application to place an arterial advertising sign was finally approved or that the arterial advertising sign actually existed. Rather, they reflect that a permit application fee and/or permit application was submitted to DOB." (*See* Arnold Decl. ¶ 42.)

The parties disagree about the availability of the documents that the City considers reliable. The City says that DOB issued permits in 1980 to legalize non-conforming signs. (*Id.* ¶¶ 48-50; Def. Ex. Z, Ex. CC.) The Clear Channel Plaintiffs argue that outdoor advertising companies typically retained only cashier's receipts-which look like permits-issued by DOB, and that DOB now considers these receipts unreliable. (*See* Geraghty Affirmation ¶ 65 & Ex. H.) The Plaintiffs state that in many cases outdoor advertising companies found little reason to retain key documents, either because of lack of enforcement or lax record-keeping by small businesses. In other cases documents may have been lost due to a series of acquisitions in the industry. (*Id.* ¶¶ 61-63.) As a whole, the Clear Channel Plaintiffs paint a picture of an unregulated, disorganized registration and record-keeping process that has left the outdoor advertising companies without access to the very documentation they need to qualify a sign for non-conforming use status. Nonetheless, current enforcement cannot be avoided or evaded by criticizing past practices and less stringent enforcement.[30]

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[30] The Clear Channel Plaintiffs further challenge the provisions of 1 RCNY § 49-15(d)(15)(c), which requires an affidavit signed by a registered architect or engineer, as well as an officer of the outdoor advertising company. The architect or engineer must state that he or she believes the sign to be non-conforming based on the evidence submitted, and the company officer must state that to the best of his or her knowledge there has not been any discontinuance of the non-conforming use for two or more years. *Id.* The Clear Channel Plaintiffs state that out-door advertising companies will have difficulty locating an engineer who could sign such an affidavit. (*See* Geraghty Affirmation ¶¶

The issue for the First Amendment analysis is whether the provisions of Rule 49 directly advance the City's interest in traffic safety and aesthetics and whether the regulations are narrowly tailored to meet those goals. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. The registration provisions of Rule 49 pass both tests.

The provisions directly advance the City's interests and are narrowly tailored to serve those interests because the provisions are necessary to ensure an accurate accounting of the non-conforming use signs. The history of billboard regulation in New York shows that accurate record-keeping was a low priority in the industry, for reasons that are likely attributable to both parties. Now that the City intends to properly regulate the industry,[31] it has created a system which provides a minimal opportunity for fraud-an entirely appropriate concern given the outdoor advertising industry's uncontroverted history of illegal bill-board construction and conversion.

Additionally, the requirements are not unduly harsh. The regulations do not limit the documents that outdoor advertisers may use to prove non

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57-59.) This may be a commentary on industry practices, but it is no reason to find the requirement unconstitutional.

[31] Even if the City was delinquent for years in its regulation of the outdoor advertising industry, it is well settled law that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties." *In re Schorr v. N.Y. City Dep't of Hous. Pres. and Dev.*, 10 N.Y.3d 776, 857 N.Y.S.2d 1, 886 N.E.2d 762, 764 (2008). To hold otherwise would allow pro-scribed conduct to continue to flourish, notwithstanding the fact that such conduct was and is impermissible.

conforming status. The regulations allow a variety of documents that the City considers credible, and outdoor advertisers can supplement these credible documents with evidence that the City deems less credible, such as cashier's receipts. *See* 1 RCNY § 49-15(d)(15)(b).

The Rule 49 registration requirements materially advance the City's interest in determining whether an arterial advertising sign deserves legal non-conforming use status, which, in turn, serves the goal of improving traffic safety and aesthetics by removing nonexempt signs from the highways. The registration provisions are a reasonable fit with those goals, particularly taking into account the City's past difficulty in controlling the legal registration of bill-boards and the industry's long history of admitted transgressions. The Clear Channel Plaintiffs essentially argue that Rule 49 fails under *Central Hudson* because it will not work to improve traffic safety or the appearance of the City, and because the requirements are unduly stringent. For the reasons already discussed, the Court rejects these arguments. The City's proposed regulation and documentation scheme is appropriate and not unconstitutional; any misapplication of the City's power can be easily challenged in an Article 78 proceeding.

c. Free Speech Challenge Under the New York State Constitution

The Clear Channel Plaintiffs also allege a violation of the free speech provisions of the New York State Constitution, Article 1 § 8.[32] The New York Court of Appeals has stated that the state constitution's free speech clause "contains language that is more expansive than its Federal counterpart and we have at times interpreted it in a manner that is more protective of free expression than the First Amendment to the Federal Constitution." *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713, 570 N.Y.S.2d 453, 573 N.E.2d 541, 551 (1991), *rev'd on other grounds*, 79 N.Y.2d 972, 583 N.Y.S.2d 188, 592 N.E.2d 796 (1992); *see also A.B.C. Home Furnishings, Inc. v. Town of E. Hampton*, 947 F.Supp. 635, 643 (E.D.N.Y.1996) ("New York courts have noted that the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.") (citation and internal quotation omitted).

There is no indication either in the case law or in the parties' arguments that New York State courts impose a stricter test for commercial speech regulation than that discussed in Central Hudson. This Court has found no case where a New York State court determined the standard for reviewing a

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[32] The relevant portion of Article 1 § 8 of the New York State Constitution states, "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *See* N.Y. Const. art. 1, § 8.

commercial free speech challenge under only the New York State Constitution and not the Federal Constitution as well. Where the commercial free speech challenge included a federal right, the New York courts analyzed the entire claim under *Central Hudson*. *See, e.g., Galaxy Rental Serv., Inc. v. State*, 88 A.D.2d 99, 452 N.Y.S.2d 921, 923-24 (4th Dep't 1982); *Citizens for a Safer Cmty. v. City of Rochester*, 164 Misc.2d 822, 627 N.Y.S.2d 193, 202 (Sup.Ct. Monroe Co.1994). Since this Court has already determined that the arterial advertising regulations do not violate the First and Fourteenth Amendments to the U.S. Constitution under the *Central Hudson* test, the Court also finds that the City's regulations do not violate New York State's constitutional free speech protections.

V. Application to Metro Fuel

Metro Fuel is in a different position than the Clear Channel Plaintiffs. It challenges the provisions of the Zoning Resolution that control the placement and illumination of off-site advertising signs in commercial and manufacturing districts. The zoning regulations permit Metro Fuel's non-accessory panel advertisements in C6-5, C6-7, and C7 districts with no restriction on illumination, and in C8, M1, M2, and M3 districts with illumination restrictions that make Metro Fuel's signs in those areas illegal in their current form. *See* Z.R. §§ 32-63, 42-52, 32-645, 42-533. The City incorporated location and illumination restrictions in the 1961 Zoning Resolution. (*See* Neufeld Metro Fuel Decl. ¶ 7 & Ex. G, F, and H.) The City argues that these limitations

are appropriate to preserve neighborhood character and maintain an attractive cityscape.[33]

Metro Fuel's legal arguments are essentially the same as the Clear Channel Plaintiffs'. Metro Fuel argues that the zoning restrictions are so pierced by exemptions as to undermine the City's goals. The company also argues that the City has not conducted any studies and cannot point to any evidence that the zoning restrictions will work, thus the regulations fail to directly advance the City's interests. Finally, Metro Fuel argues that the Court should be particularly sensitive to speech restrictions that block speech by private groups but allow the same speech by government.

Central Hudson 's four-part test governs the analysis here. 447 U.S. at 566, 100 S.Ct. 2343. The first two prongs are not seriously in question: the advertising that Metro Fuel hosts is neither misleading nor related to illegal activity, thus it is protected by the First Amendment; and the City's interest in aesthetics and the preservation of neighborhood character is substantial.[34] On the third

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[33] Metro Fuel argues that the City's aesthetic interests are invalid because the City awarded the Street Furniture Franchise to Cemusa even though the Evaluation Committee gave Cemusa the lowest design score among the contract bidders. This argument does not sway the Court. The City's aesthetic interests are not devalued simply be-cause it did not choose the bidder with the highest design scores.

[34] On this second prong, Metro Fuel and the City disagree about whether aesthetic interests alone can justify speech restrictions. Plaintiff cites a footnote discussing this issue in the District Court opinion in *Metro Lights*, 488 F.Supp.2d at 947 n. 10. The court there elaborated on the lack of guidance on this question, noting that in almost all cases courts have discussed traffic safety and aesthetic concerns in tandem. *Id*. As the

and fourth prongs of *Central Hudson*, whether the speech restriction directly advances the City's interests and whether the restriction reaches no further than necessary,[35] Metro Fuel argues that the City fundamentally undermines its aesthetic goals by allowing advertising similar to the Plaintiff's panel ads on street furniture, phone kiosks, and lampposts. Citing *Greater New Orleans*, 527 U.S. at 173, 119 S.Ct. 1923, and *Rubin*, 514 U.S. at 476, 115 S.Ct. 1585, Metro Fuel states that the City's outdoor advertising restrictions fail because they are underinclusive.

Metro Fuel's main objection is with the City's street furniture contract with Cemusa. That contract requires Cemusa to replace 3,100 existing bus shelters and install up to an additional 400 shelters. It also allows Cemusa to replace and install several

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parties have not made this issue a serious point of contention, the Court assumes that aesthetic concerns are a substantial interest. *See Metromedia*, 453 U.S. at 570, 101 S.Ct. 2882 ("In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community.") (Rehnquist, J., dissenting); *see also Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (noting that police power may be used to further aesthetic interests in the context of eminent domain, but not discussing speech restrictions); *Suffolk Outdoor Adver. Co. v. Hulse*, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, 265 (1977) ("Although once open to question, it is now equally clear that the regulation of outdoor advertising for aesthetic purposes alone constitutes a valid exercise of the police power.")

[35] As discussed earlier, many courts combine the analysis of these last two prongs of *Central Hudson*. The ultimate analysis of the final two prongs "basically involve[s] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Edge Broad.*, 509 U.S. at 427-28, 113 S.Ct. 2696 (citation omitted).

hundred newsstands. Each bus shelter can contain two advertisements sized at 27.5 square feet each-slightly larger than Metro Fuel's panel signs. The newsstands may display up to 82.5 square feet of advertising, with panels of varying sizes. The bus shelter advertisements may be internally illuminated, much like the Metro Fuel panel signs. The street furniture ads and Metro Fuel's panels may be located very near each other: Metro Fuel's panel signs are attached to buildings and poles off the far edge of the sidewalk; the bus shelters and newsstands are located on the street edge of the sidewalk, potentially only several feet away from Metro Fuel's advertisements.[36]

Greater New Orleans and *Rubin* hold that a speech regulation may fail where the content proscribed is directly contradicted by exceptions

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[36] Metro Fuel also cites the thousands of advertisements on public pay telephones, on lamppost banners, and on street-level stair-case railings at the entrance to MTA subway stations (MTA "urban panels") as evidence of the City's underinclusive speech restrictions. The advertising on the public telephones typically ranges from approximately 11 square feet to 21 square feet, and the advertising is carried out under a number of different franchise agreements with the City. (SOF ¶¶ 95-99.) The advertising on the lamppost banners is essentially the same square footage as Metro Fuel's panel advertisements, but the City limits the banners to cultural or community content, with up to 10% of each banner available for corporate sponsorship. (*Id.* ¶ 111.) The MTA urban panels are approximately 11 square feet. (*Id.* ¶ 36.) As discussed earlier in Background Section IV(a)(ii), the City does not have the authority to regulate these urban panels as they are on the property of the Transit Authority. As for the pay telephones and lamp-post banners, the Court's analysis of the Cemusa street furniture agreement applies equally to the City's regulation of those forms of commercial speech.

permitting the same type of speech that is impermissible. *See Greater New Orleans*, 527 U.S. at 192-93, 119 S.Ct. 1923 (noting that in *Greater New Orleans*, as in *Rubin*, "there was 'little chance' that the speech restriction could have directly and materially advanced its aim, 'while other provisions of the same Act directly undermined and counteracted its effects' ") (citing *Rubin*, 514 U.S. at 489, 115 S.Ct. 1585).

The City argues that it has a valid reason to distinguish between advertising on buildings and poles covered by the Zoning Resolution and advertising on streets which are not covered by zoning. Controlled advertising on street furniture, lamppost banners, and telephone kiosks harmonizes the streetscape, and does not undermine the City's aesthetic interest in restricting similar advertising attached to buildings which are subject to zoning limitations. To support this distinction the City points to a declaration from Douglas Woodward, who describes himself as having more than 20 years of experience as a "planner and urban designer at the New York City Department of City Planning," among his other relevant credentials. (*See* Declaration of Douglas Woodward ("Woodward Decl.") ¶ 6.) Mr. Woodward states that the street is a dynamic and unitary network that links neighborhoods of a city. (*Id.* ¶ 19.) The street is naturally filled with information such as directional signs and safety notices, as well as with amenities such as bus stops, newsstands, and fire hydrants. (*Id.* ¶ 40.) Mr. Woodward argues that while the street "is a medium for public communication," the façades of buildings on private property are of a wholly different character. (*Id.* ¶¶ 43-44.) The public's expectation of signage on buildings is to identify the uses within

the building, and off-site advertising on building fronts "blurs the distinction between public and private, and makes the City more chaotic, less readily understandable, and erodes the sense of place." (*Id.* ¶ 45.)

While Metro Fuel discounts Mr. Woodward's analysis, he is not wrong. Zoning covers property and buildings, but streets are in the public right of way. The City's vitality, activity, and diversity are manifested on its streets, and streets are the community's natural gathering points. *See, generally*, Jane Jacobs, *The Death and Life of Great American Cities* (Random House 1961). It is not fanciful to suggest that there is a real distinction between streets and buildings. Certainly it is permissible for the City to regulate, via its franchise rules, a wide variety of street furniture, including bus stop shelters and newsstands, so that they are uniform and contribute to a harmonizing scheme for city streets. The Street Furniture Franchise enables the City to tie together many of the disparate elements on the City's street grid. That goal cannot be achieved by zoning because zoning is not applicable. The City's actions with regard to streets in the public right of way cannot compromise or restrict its abilities to apply different rules via zoning for the simple reason that buildings are not streets and streets are not buildings. Different rules may be applied. The City's approach is entirely consistent with *Metromedia* and the recent Ninth Circuit decision in *Metro Lights*.

The *Metromedia* Court held that it was valid for San Diego to determine that "some commercial interests outweigh[ed] its municipal interests" in traffic safety and aesthetics, thus San Diego could

ban off-site commercial advertising while determining that on-site commercial advertising had enough social value to overcome the City's protective desires. *Metromedia*, 453 U.S. at 512, 101 S.Ct. 2882. Simply because San Diego valued on-site accessory advertising, it did not follow that San Diego "must give similar weight to all other commercial advertising." *Id.* The Ninth Circuit followed similar reasoning in reversing the District Court's decision in *Metro Lights*, which Metro Fuel had relied upon extensively in this case. *See Metro Lights*, 551 F.3d at 910-11. The Ninth Circuit refused to overturn Los Angeles' legislative decision to value one type of commercial speech-controlled off-site advertising on public transit facilities-over another type of commercial speech-uncontrolled off-site advertising spread around the streets. *Id.* ("As the district court noted, the City has been compensated handsomely for this classically legislative decision ... The *Metromedia* Court declined to overrule such a legislative judgment, and so do we.") (internal citation omitted).

Here, New York City has a basis for distinguishing between off-site commercial advertising within the Street Furniture Franchise and off-site commercial advertising on building façades and poles. The former is obviously on the streets, not buildings, and is subject to the design controls contained in the City's franchise agreement with Cemusa. The City can control the size, location, and appearance of the advertisements on the street furniture. (*See* Cemusa Franchise Agreement, located at Hecker Decl. Ex. 13 at 12-13, 19-20.) Indeed, one major goal of the Street Furniture Franchise was to provide a harmonized, coordinated, and well-maintained appearance to the City's street

furniture, while also reducing clutter on City sidewalks. (See Neufeld Metro Fuel Decl. Ex. S at 6, 24, 26; *id.* Ex. T at 3; *id.* Ex. v. at 3; *id.* Ex. P at NYCOTR007002; Gould-Schmit Decl. ¶¶ 6-7, located at Neufeld Metro Fuel Decl. Ex. B.)[37] Allowing limited and controlled advertising on the street furniture meets this goal.

The Plaintiff's panel advertisements, to the contrary, represent the type of uncontrolled visual clutter that led the City to enact restrictive zoning regulations. Building façades throughout the City are already chock full of accessory signage. It is not unreasonable for the City to try to impose some limits on commercial advertising. Metro Fuel can advertise without restriction in a number of areas. Metro Fuel also can legitimize a large number of its signs by changing the illumination scheme. While the First Amendment is broad, it has yet to be held that it trumps a City's right to impose illumination requirements. Further, it must be noted that Metro Fuel is the architect of much about which it complains. Metro Fuel erected most of its panel advertisements without permits to do so. (Metro SOF ¶ 4.) Metro Fuel also erected 80 additional panel signs between September 2007, when the City agreed to stay enforcement of Metro Fuel's 360 panel signs, and August 2008, when Metro Fuel reported to this Court that it operated approximately 440 panel signs. (*Compare* Neufeld Metro Fuel Decl. Ex. NN *with* Freedman Decl. ¶ 2.)

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[37] The CDP1 originally approved a coordinated street furniture franchise plan in 1996, but later decided not to award a contract under the plan. The City revised the franchise plan in 2003 and used many of the same criteria from the earlier plan. (*See* Gould-Schmit Decl. ¶¶ 13-36.)

Consistent with *Metromedia* and the Ninth Circuit's decision in *Metro Lights*, the Court accepts New York City's legislative and executive franchise determination that controlled, coordinated off-site advertising on street furniture carries a greater value than uncontrolled off-site advertising on buildings. *See Metromedia*, 453 U.S. at 512, 101 S.Ct. 2882 ("San Diego has obviously chosen to value one kind of commercial speech-onsite advertising-more than another kind of commercial speech-offsite advertising ... We do not reject that judgment."); *Metro Lights*, 551 F.3d at 911 ("[H]ere there is 'some basis for distinguishing' offsite commercial signage concentrated and controlled at transit stops and uncontrolled, private, offsite commercial signage 'that is relevant to an interest asserted by the city.' ") (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)); *see also Jim Gall Auctioneers, Inc. v. City of Coral Gables*, 210 F.3d 1331, 1333 (11th Cir.2000) (up-holding regulation that prohibited advertising auctions of non-homeowner goods in a residential district while also allowing advertising for other types of commercial sales); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 (11th Cir.1987) ("[A] partial solution to a city's aesthetic problems may still directly advance the city's goals. The Constitution does not require the City to choose between curing all of its aesthetic problems or curing none at all."). Streets and buildings are different; accordingly, different standards may be imposed. Metro Fuel does not like the distinction, but it is not, as the Court in *Greater New Orleans* described it, "distinguish[ing] among the indistinct." 527 U.S. at 195, 119 S.Ct. 1923.

It is clear that the zoning regulations controlling the placement and illumination of the Plaintiff's panel advertisements pass the third prong of *Central Hudson* because they will directly advance the City's interest in improving the attractiveness of the buildings facing the streets. Metro Fuel argues that the regulations fail this prong because the City has conducted no studies to show that the regulations will work, as the Supreme Court required in *Edenfield*. *See* 507 U.S. at 770-71, 113 S.Ct. 1792 (the burden of justifying a restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

Numerous courts have held, however, that a municipality's judgment that outdoor advertising signs cause an aesthetic harm is not mere speculation, as any observer can determine simply by walking on a busy City street. No study is required to prove what the eye can readily detect. The Supreme Court discussed this issue when analyzing *Central Hudson* 's third prong in *Metromedia* and held that, "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.' ... Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." 453 U.S. at 510, 101 S.Ct. 2882 (citations omitted); *see also Taxpayers for Vincent*, 466 U.S. at 807, 104 S.Ct. 2118 ("We reaffirm the conclusion of the majority in

Metromedia. The problem addressed by this ordinance-the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property-constitutes a significant substantive evil within the City's power to prohibit."); *Infinity Outdoor*, 165 F.Supp.2d at 417 (citing *Metromedia*, 453 U.S. at 509-10, 101 S.Ct. 2882).

Metro Fuel suggests that the City's aesthetic concerns are only a masquerade for the City's real interest in making money - i.e., it argues that the City limits advertising on buildings in order to enhance its revenues from the Street Furniture Franchise. That may be, but the uncontroverted fact is that the City's aesthetic concerns regarding advertising signs date back almost seven decades. In 1940, when the City first began regulating outdoor signs through zoning amendments, the CDP1 discussed how the attractiveness of the City's streets had a vital economic impact and that off-site advertising signs and billboards had become a problem. The CDP1 stated that it:

> early reached the conclusion that far from being a purely aesthetic matter, as was claimed by many at the hearings, this problem is primarily economic and hence of fundamental concern both to private individuals and to the city itself. What power has a city to attract or even retain residents, *if its home areas are rendered unattractive by reason of excessive outdoor advertising displays*?

See Neufeld Metro Fuel Decl. Ex. E at 90 (emphasis added). Those concerns have nothing whatsoever to

do with the City franchise for street furniture. The City determined long ago that advertising signs could have a detrimental economic impact on the City, and thus it passed zoning laws to deter the problem. It added to those laws in 1961 to restrict off-site advertising signs to certain districts. The City's determination that advertising signs cause an aesthetic harm is backed by adequate legislative history and is more than just "a public rationalization of an impermissible purpose." *Metromedia*, 453 U.S. at 510, 101 S.Ct. 2882. Its long-standing concerns both pre-date and are separate and apart from its agreement with Cemusa.

The regulations satisfy *Central Hudson* 's fourth prong because they are no more extensive than necessary. The regulations must be "a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable." *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 632, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (internal quotations and citations omitted). Additionally, "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech ... is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.' " *Id.* (citing *Discovery Network*, 507 U.S. at 417 n. 13, 113 S.Ct. 1505). The relevant zoning regulations do not ban advertising. If Metro Fuel changed its illumination scheme it could lease more signs. The restrictions here are not on signs but on illumination. Indeed, off-site outdoor advertising signs are allowed in specific commercial and manufacturing areas of the City where the negative aesthetic impact will be minimal. The Zoning Resolution is not overbroad. It limits outdoor advertising signs only in districts where the

City believes they cause an aesthetic harm. Metro Fuel's panel advertisements are still allowed in significantly large areas of the City, just not in all the places where Metro Fuel wishes. It hardly needs to be said that Metro Fuel's wishes are not constitutional commands.

The Supreme Court, applying *Central Hudson* prong four in *Metromedia*, held that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends." 453 U.S. at 508, 101 S.Ct. 2882. Here, similarly, the City has not gone further than necessary in restricting Metro Fuel's panel advertisements to certain areas of the City and to certain illumination requirements.[38]

Lastly, Metro Fuel argues that courts must be particularly wary of speech regulations that benefit the government while excluding others. Similar to the Clear Channel Plaintiffs, Metro Fuel cites *Nichols Media Group*, where the court struck down a portion of a billboard ordinance that contained an express exception for government signs. 365 F.Supp.2d at 316 ("By freeing governmental signs from the reach of the Ordinances, the Towns have created an impermissible distinction that favors the Towns' speech over that of other speakers."). In *Nichols Media Group* the ordinance restricted off-site advertising signs, portable signs, and obscene signs,

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[38] For the same reasons as outlined in Discussion Section IV(c), *supra* pp. 508-09, Metro Fuel's claim under the New York State Constitution is denied

while fully exempting governmental signs from regulation. *Id.* at 300-01. *Nichols* is not really applicable here for the simple reason that the Zoning Resolution does not exempt the City from its requirements. As previously observed, the Zoning Resolution, which controls privately owned buildings and lots, is not applicable to City property in the public right of way.

The Ninth Circuit in *Metro Lights* recognized the distinction being made here. The Plaintiffs in *Metro Lights* argued that Los Angeles had impermissibly allowed itself to host advertising while excluding privately controlled advertising. The Ninth Circuit rejected the argument:

> Metro Lights has implied several times that the City's overall scheme makes the City a monopolist in the supply of commercial advertising space ... But the First Amendment does not prohibit municipal monopolies. As long as the City can show with plausibility sufficient to merit the deference of *Metromedia* that the Sign Ordinance, even coupled with the [street furniture agreement], advances the City's interests and is narrowly tailored, then the City's policy survives First Amendment scrutiny.

Metro Lights, 551 F.3d at 914 n. 13. As previously discussed, the City's Zoning Resolution advances the City's interest and is no more extensive than necessary. Additionally, the City's franchise of street furniture and pay telephones advances its interests and is applicable only in the public right of way. For the reasons previously stated, the City's franchise on the City's streets does not compromise its ability to regulate advertising via its Zoning Resolution, which by its own terms does not govern the streets.

CONCLUSION FOR ALL PARTIES

Upon review of the voluminous record, the Court has determined that there are no issues of material fact in either of the cases. Any factual disputes are trivial, non-essential, and do not materially affect the out-come of the cases. Accordingly, summary judgment is appropriate.

The City's zoning regulations, which restrict the location of commercial advertising signs immediately adjacent to its arterial highway system, satisfy the constitutional test for commercial speech restriction and are not unconstitutionally underinclusive. New York City has substantial interests in restricting outdoor advertising signs near highways, its zoning ordinance will directly advance those interests, and the regulations are not more extensive than necessary. The few exceptions to the ban on off-site commercial arterial advertising that remain along the City's roads do not undermine the constitutionality of the Zoning Resolution. For the same reasons, the Zoning Resolution's registration and documentation requirements also pass constitutional muster. Since the City's rules are constitutional, the Clear Channel Plaintiffs cannot show irreparable harm and a likelihood of success on the merits. Accordingly, for the reasons already outlined in this Opinion and Order, the Defendants' motion for summary judgment is GRANTED and the Clear Channel Plaintiffs' motions for summary judgment and for a preliminary injunction are DENIED.

Likewise, there is no constitutional infirmity with the Zoning Resolution's location and illumination restrictions that affect Metro Fuel. The City has a

substantial interest in protecting neighborhood aesthetics, the regulations directly advance that interest, and they are not more extensive than necessary. The City's franchise for street furniture, which permits advertising, does not undermine the Zoning Resolution's constitutionality. Accordingly, for the reasons already discussed, the City's motion for summary judgment is GRANTED and Metro Fuel's motion for summary judgment or for a preliminary injunction is DENIED. The Clerk of the Court is ordered to close out this case.

SO ORDERED.

APPENDIX C

Relevant Excerpts From the New York City Zoning Resolution

12-10 – Definitions

Accessory use

An "accessory use":

(a) is a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory building or other structure, or as an accessory use of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, accessory docks, off-street parking or off-street loading need not be located on the same zoning lot; and

(b) is a use which is clearly incidental to, and customarily found in connection with, such principal use ; and

(c) is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.

Sign, Advertising

An "advertising sign" is a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot.

Residential District Provisions:

22-32 – Permitted Non-Illuminated Accessory Signs

In all districts, as indicated, non-illuminated accessory signs are permitted as set forth in this Section, subject to the provisions of Section 22-34.

Commercial District Provisions:

32-62 – Permitted Signs

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, signs other than advertising signs are permitted subject to the provisions of the following Sections:

Section 32-64 (Surface Area and Illumination Provisions)

Section 32-65 (Permitted Projection or Height of Signs)

Section 32-66 (Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways)

Section 32-67 (Special Provisions Applying along District Boundaries)

Section 32-68 (Permitted Signs on Residential Buildings)

Section 32-69 (Additional Sign Regulations for Adult Establishments)

However, notwithstanding any provision of this Section, flags, banners or pennants other than those that are advertising signs, located on any zoning lot used primarily for community facility uses of a civic, philanthropic, educational or religious nature, are permitted in all districts, as indicated, without limitation.

32-63 – Permitted Advertising Signs

C6-5 C6-7 C7 C8

In the districts indicated, advertising signs are permitted subject to the applicable provisions of the following Sections:

Section 32-64 (Surface Area and Illumination Provisions)

Section 32-65 (Permitted Projection or Height of Signs)

Section 32-66 (Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways)

Section 32-67 (Special Provisions Applying along District Boundaries)

Section 32-68 (Permitted Signs on Residential Buildings).

32-64 – Surface Area and Illumination Provisions

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, all permitted signs shall be subject to the restrictions on surface area and illumination as set forth in this Section, provided that the following signs shall be exempted from such restrictions on surface area:

Illuminated non-flashing signs other than advertising signs located in a window within a building, with a total surface area not exceeding eight square feet on any zoning lot and limited to not more than three such signs in any window.

For the purpose of determining permitted surface area of signs for zoning lots occupied by more than one establishment, any portion of such zoning lot occupied by a building or part of a building accommodating one or more establishments on the ground floor may be considered as a separate zoning lot.

No illuminated sign shall have a degree or method of illumination which exceeds standards established by the Department of Buildings by rule pursuant to the City Administrative Procedure Act. Such standards shall ensure that illumination on any illuminated sign does not project or reflect on residences, loft dwellings or joint living-work quarters for artists so as to interfere with the reasonable use and enjoyment thereof. Nothing herein shall be construed to authorize a sign with indirect illumination to arrange an external artificial source of illumination so that direct rays of light are projected from such artificial source into residences, loft dwellings or joint living-work quarters for artists.

32-641 – Total surface area of signs

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, the total surface area of all permitted signs, including non-illuminated or illuminated signs, shall not exceed the limitation established for non-illuminated signs, as set forth in Section 32-642.

32-65 – Permitted Projection or Height of Signs

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, all permitted signs are subject to the applicable regulations of this Section.

32-651 – Permitted projection in C6-5, C6-7 or C7 Districts

C6-5 C6-7 C7

In the districts indicated, except as otherwise provided in Section 32-653 (Additional regulations for projecting signs), no permitted sign shall project across a street line more than eight feet.

32-652 – Permitted projection in all other Commercial Districts

C1 C2 C3 C4 C5 C6-1 C6-2 C6-3 C6-4 C6-6 C6-8 C6-9 C8

In the districts indicated, except as otherwise provided in Section 32-653 (Additional regulations for projecting signs), no permitted sign shall project across a street line more than 18 inches for double- or multi-faceted signs or 12 inches for all other signs.

32-653 – Additional regulations for projecting signs

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, permitted signs other than advertising signs may be displayed as follows:

(a) Non-illuminated signs may be displayed on awnings or canopies permitted by the Administrative Code, with a surface area not exceeding 12 square feet and with the height of letters not exceeding 12 inches. Any commercial copy on such signs shall be limited to identification of the name or address of the building or an establishment contained therein.

(b) Signs may be displayed on marquees permitted by the Administrative Code, provided that no such sign in a district other than a C6-5, C6-7 or C-7 District shall project more than 48 inches above nor more than 12 inches below such marquee.

32-654 – Height of signs in C8 Districts

C8

In the district indicated, permitted signs shall not extend to a height greater than 40 feet above curb level, provided that non-illuminated signs or signs with indirect illumination may extend to a maximum height of 58 feet.

32-66 – Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, all permitted signs are subject to the applicable regulations of this Section.

For the purposes of this Section, arterial highways shall include all highways that are shown on the Master Plan of Arterial Highways and Major Streets as "principal routes," "parkways" or "toll crossings," and that have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply.

32-661 – Additional regulations for signs other than advertising signs

C6-5 C6-7 C7 C8

In the districts indicated, and within 200 feet of an arterial highway or a public park with an area of one-half acre or more, no permitted sign that is within view of such arterial highway or public park shall exceed 500 square feet of surface area.

Beyond 200 feet from such arterial highway or public park, the surface area of such signs may be increased one square foot for each linear foot such sign is located from the arterial highway or public park.

Upon application, these requirements shall be waived, provided that the Chairperson of the City Planning Commission certifies that:

(a) such waiver is limited to a single, non-flashing sign that is located on a zoning lot not less than one and one-half acres; and

(b) all other permitted signs located on such #zoning lot that are subject to the provisions of this Section conform with all the sign regulations applicable in C1 Districts.

32-662 – Additional regulations for advertising signs

C6-5 C6-7 C7 C8

In all districts, as indicated, no advertising sign shall be located, nor shall an existing advertising sign be structurally altered, relocated or reconstructed within 200 feet of an arterial highway or of a public park with an area of one half acre or more, if such advertising sign is within view of such arterial highway or public park. For the purposes of this Section, arterial highways shall include all highways which are shown on the Master Plan of Arterial Highways and Major Streets, as "principal routes," "parkways" or "toll crossings," and which have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply. Beyond 200 feet from such arterial highway or public park, an advertising sign shall be located at a distance of at least as many linear feet therefrom as there are square feet of surface area on the face of such #sign#. However, in all districts as indicated, the more restrictive of the following shall apply:

(1) Any advertising sign erected, structurally altered, relocated or reconstructed prior to June 1, 1968, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, shall have legal non-conforming use status pursuant to Section 52-83, to the extent of its size existing on May 31, 1968.

(2) Any advertising sign erected, structurally altered, relocated or reconstructed between June 1, 1968 and November 1, 1979, within 660 feet of the nearest edge of the right of way of an arterial highway, whose message is visible from such arterial highway, and whose size does not exceed 1,200 square feet in surface area on its face, 30 feet in height, and 60 feet in length, shall have legal nonconforming use status pursuant to Section 52-83, to the extent of its size existing on November 1, 1979. All advertising signs not in conformance with the standards set forth herein shall terminate.

Manufacturing District Provisions:

42-52 – Permitted Signs

M1 M2 M3

In all districts, as indicated, signs are permitted subject to the provisions of the following Sections:

Section 42-53 (Surface Area and Illumination Provisions)

Section 42-54 (Permitted Projection or Height of Signs)

Section 42-55 (Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways)

Section 42-56 (Special Provisions Applying Along District Boundaries)

Section 42-57 (Additional Sign Regulations for Adult Establishments)

Section 42-58 (Signs Erected Prior to December 13, 2000).

However, notwithstanding any provision of this Section, flags, banners or pennants other than those that are advertising signs, located on any zoning lot used primarily for community facility uses of a civic, philanthropic, educational or religious nature, are permitted in all districts, as indicated, without limitation.

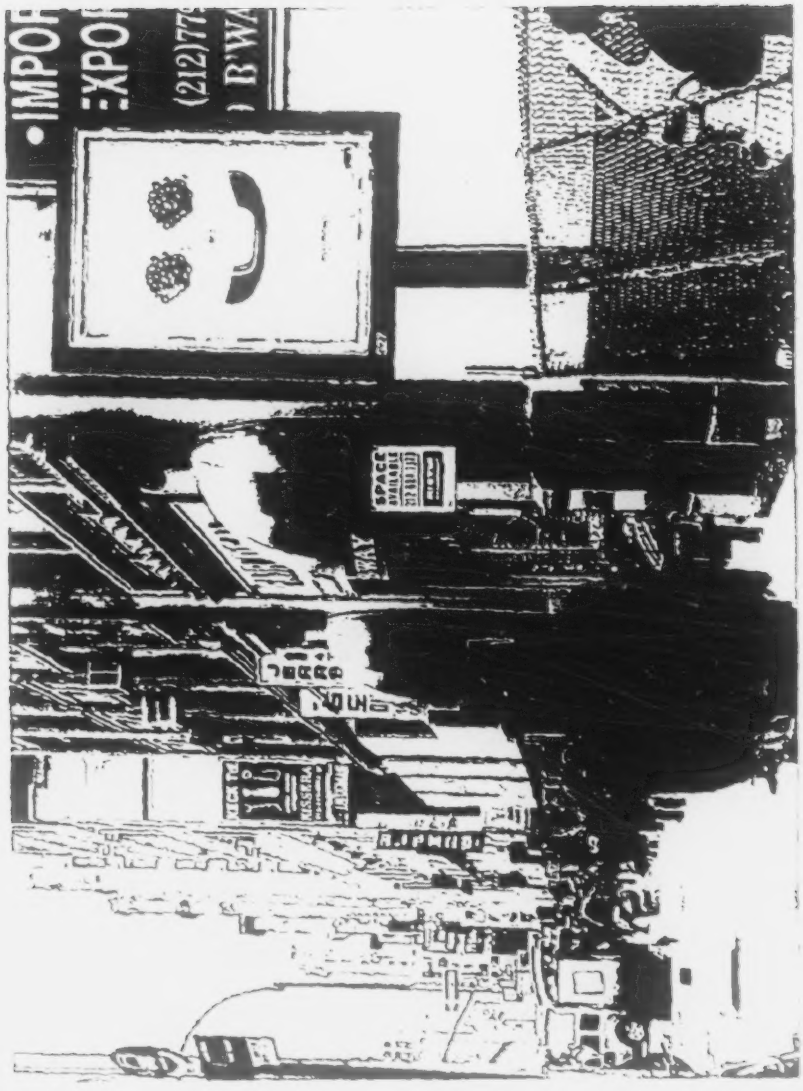
42-543 – Height of signs

M1 M2 M3

In all districts, as indicated, permitted signs shall not extend to a height greater than 40 feet above curb level, provided that non-illuminated signs or signs with indirect illumination may extend to a maximum height of 75 feet.

APPENDIX D

PHOTOGRAPHIC EXHIBITS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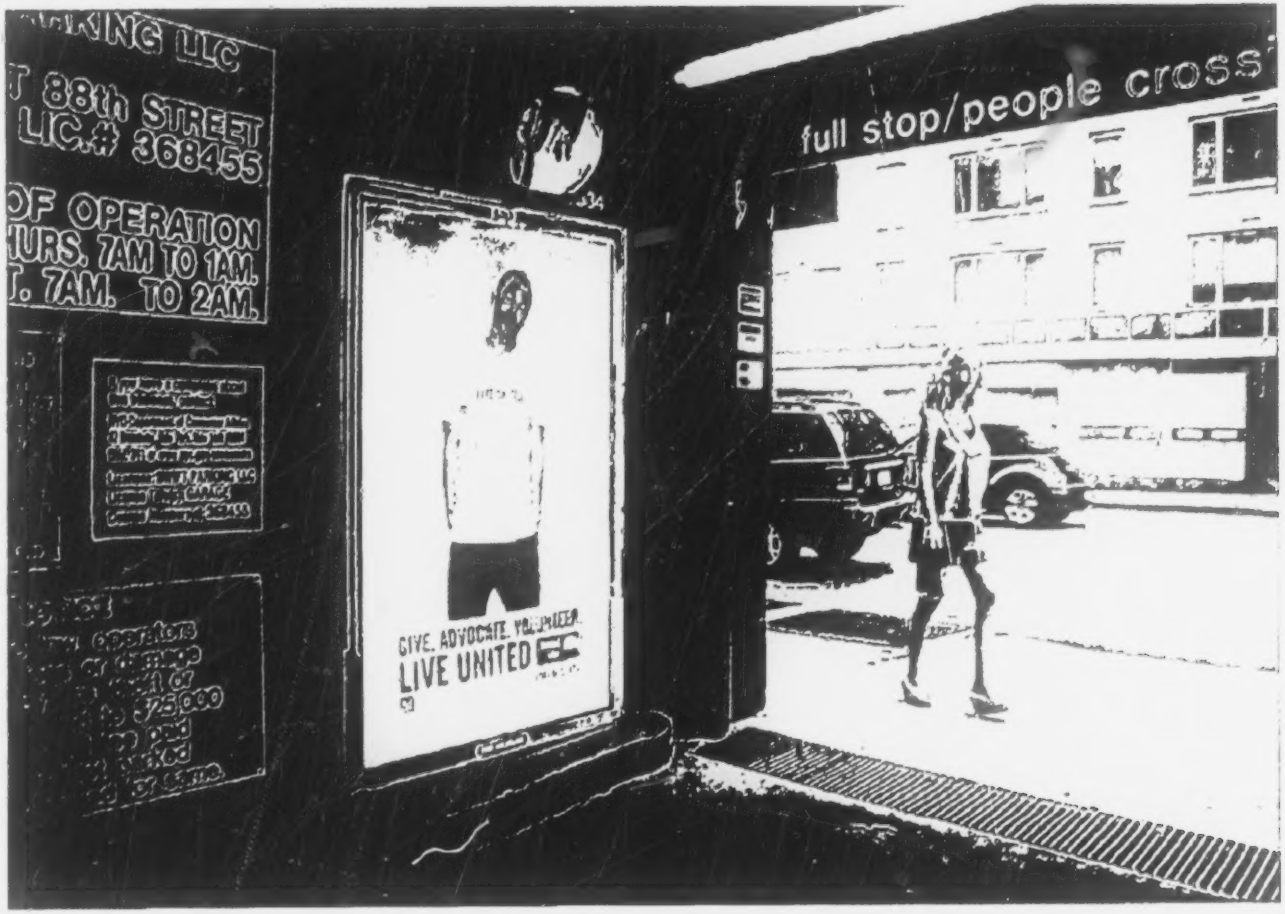
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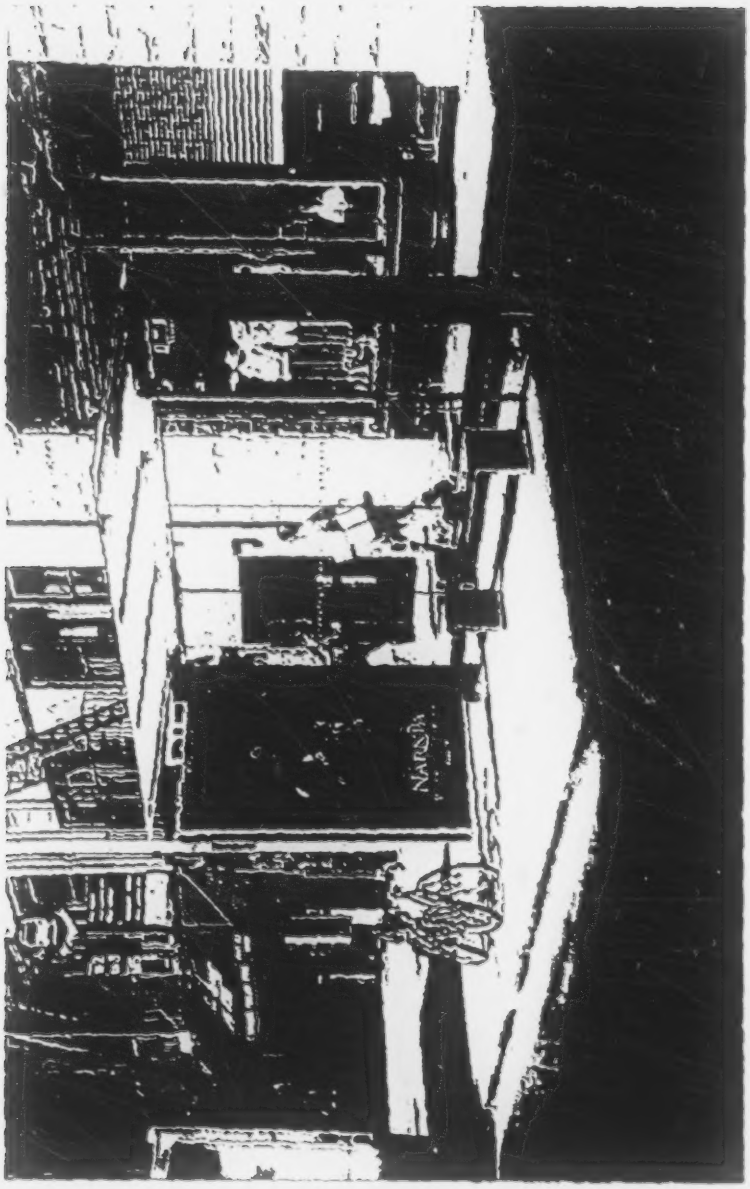
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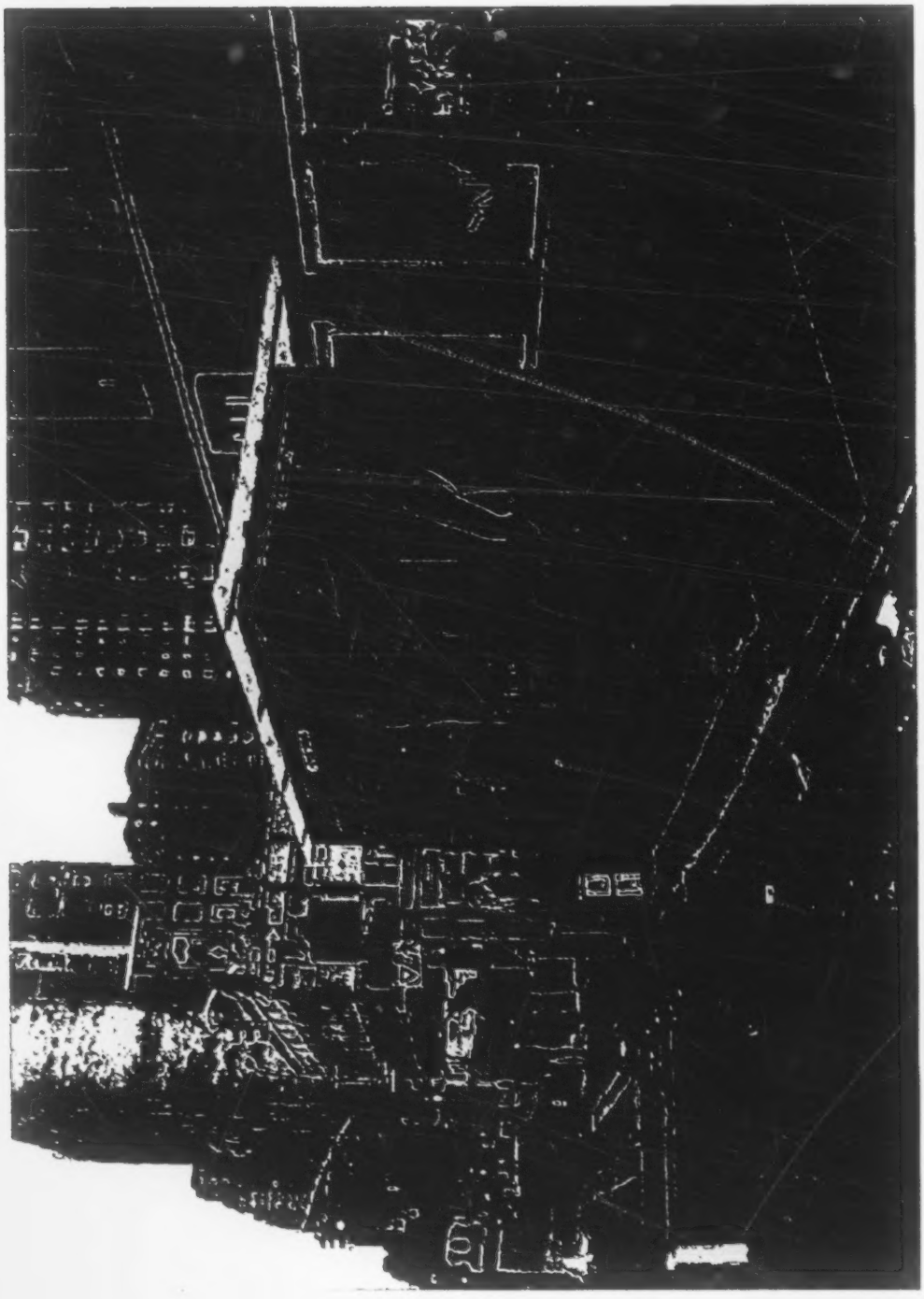

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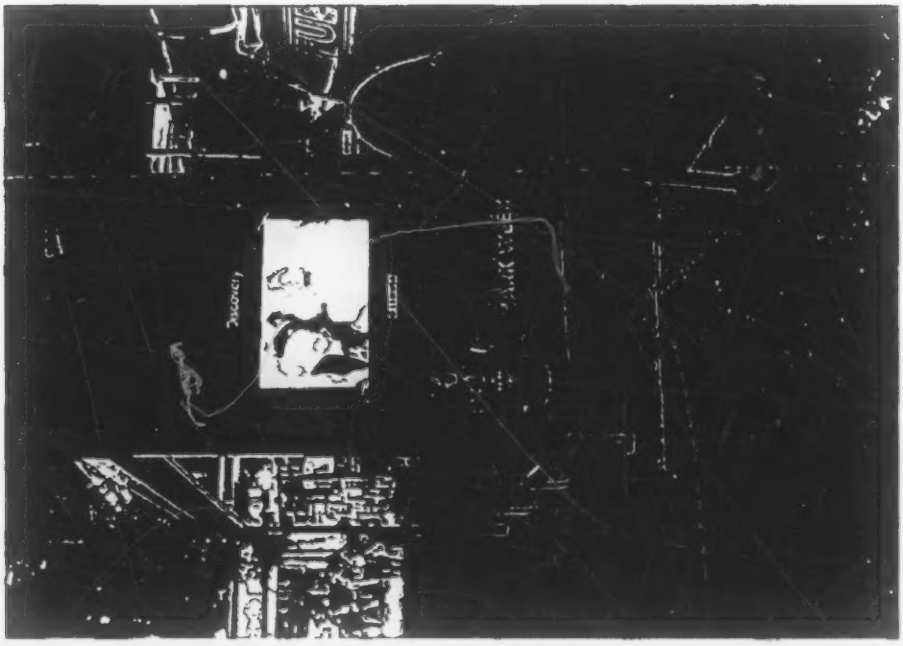

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(3)

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No. 10-79

In the
Supreme Court of the United States

METRO FUEL L.L.C,

Petitioner,

-v.-

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this case, which involves facts virtually identical to those in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (Dec. 20, 2009), present any new issues that justify reexamining *Metromedia*?

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STATEMENT OF FACTS

A. Factual Background

The City of New York has long recognized the negative impact billboards and advertising signs have on aesthetics and neighborhood preservation. In 1940, the New York City Planning Commission found that "[b]illboards and signs not only dominate our business streets . . . but they take advantage of every opportunity to crowd in upon public places, established and maintained by public funds, including civic centers, parks, and especially express highways and bridge approaches."

As a result, the City enacted a series of regulations to control the placement of advertising signs throughout the City. These regulations, which have remained in place in substantially similar form since 1940, remain an integral component of the zoning framework designed to preserve neighborhood character and an aesthetically pleasing landscape and protect the public health, safety and welfare. Specifically, advertising signs are prohibited in residential and low-density commercial zoning districts, and permitted, subject to certain size, placement and lighting restrictions, in high-density commercial and manufacturing zoning districts. See Z.R. §§ 22-32, 32-62, 32-63 and 42-52.

Metro Fuel, LLC ("Fuel") entered the outdoor advertising market in New York City in 2006. Its website encourages clients to "saturate a neighborhood with [their] message or 'road block' key areas to reach commuters twice daily." While

Fuel operates many different types of outdoor advertising signs in the City, its challenge in this lawsuit centered on what it describes as its "panel sign business." Fuel describes its panel signs as measuring approximately 69 inches tall by approximately 48 inches wide, or 23 square feet in total. As of the date it filed its complaint, Fuel operated approximately 360 panel signs in the City; however by July 28, 2008, this number had increased to 440. Fuel's panel signs are displayed in a variety of ways, including affixed to the facades of buildings and on free-standing poles. Fuel claims that 93% of its panel signs are located in zoning district which prohibit internally illuminated advertising signs.

Bus shelters were first introduced as a public amenity on City streets in the early 1970s but they quickly deteriorated due to poor maintenance. Beginning in 1975, bus shelters were installed throughout the City by private companies and advertising was permitted on the shelters both to encourage private involvement and to offset the cost of installation, maintenance and repair. Over time, various other types of street furniture were also constructed on City sidewalks, however, the regulation, construction, and maintenance of this furniture occurred in different ways with varying levels of coordination and consistency.

In the 1990s, the Mayor's Streetscape Task Force was created to, among other things, design a proposal to provide a harmonized, coordinated, and well-maintained appearance to the City's street furniture, while reducing clutter on City sidewalks. After a competitive bidding process, Cemusa was awarded the franchise. In May 2006, the City

entered into a 20-year contract with Cemusa. Under the contract, Cemusa is required to build and/or replace approximately 3,500 bus shelters, 330 newsstands and 20 self-cleaning automatic pay toilets ("APTs"). Cemusa is responsible for the design, construction, installation, and maintenance of the street furniture.

The agreement grants Cemusa the exclusive right to place limited and controlled advertising on bus stop shelters, newsstands, and APT's located outside of parks. On bus stop shelters, advertising is limited to the two end panels, and to the exterior of newsstands and public toilets. In addition, there are maximum area and height restrictions. The City receives a percentage of the gross advertising revenue.

B. Opinions Below

In a decision and order dated March 31, 2009, the District Court for the Southern District of New York denied Fuel's motion for summary judgment and granted the City's cross-motion for summary judgment. App. B. 1-77.

On February 3, 2010, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision. With respect to plaintiff's underinclusivity challenge, the Second Circuit found this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) controlling. The Second Circuit rejected plaintiff's argument that the City violated the protections afforded commercial speech because it treats similar signs differently. Citing *Metromedia*, the Court found that despite its exceptions, New York City's Zoning Resolution directly advanced its

interest in traffic safety and aesthetics. Similarly, in *Metromedia*, this Court made explicit reference to the exceptions to the ban of offsite advertising, but did not find the exemptions constitutionally problematic. App. A-21.

Moreover, citing the Ninth Circuit's decision in *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (2009), the Second Circuit found that the controlled advertising permitted under its contract with Cemusa is sufficiently distinct from Fuel's advertising, advertising that is subject to the zoning restrictions. App. A-23.

Finally, the Second Circuit found that underinclusivity cases cited by plaintiffs, *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), dictate the same result as *Metromedia*. App. A-23-28. The Court found the instant case distinguishable from the above cases, stating:

> [t]he distinctions drawn by the Zoning Resolution between permissible and impermissible locations for outdoor commercial advertising are meaningful and do not defeat the purpose of the City's regulatory scheme. The City's scheme may legitimately allow limited and controlled advertising on street furniture, while also reducing clutter on City sidewalks. Allowing some signs does not constitutionally require a city to allow all similar signs. The

> zoning scheme does not result in a mere channeling effect. The City's interest in aesthetics, preservation of neighborhood character, and traffic safety continue to be advanced, even though limited and controlled advertising is permitted on street furniture.

App. A-28.

REASONS FOR DENYING THE PETITION

This instant petition should be denied. This Court recently denied certiorari in *Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (2009), a case which presented a virtually identical issue and where petitioner's also argued that *Metromedia v. City of Los Angles*, 453 U.S. 490 (1981), should be revisited. Nothing has occurred in the last nine months to suggest that a different outcome is appropriate here.

A. There is no conflict among the circuits that would justify granting the petition.

As Metro Lights also attempted to do, Fuel goes to great lengths to manufacture a conflict among the circuits. However, no conflict exists on a legal issue that would justify certiorari. While a few circuits have questioned whether this Court issued any controlling opinions in *Metromedia*, the circuits' application of *Metromedia* with respect to the legal issues presented here has been consistent. Indeed, Fuel fails to point to any relevant legal principal in *Metromedia* over which the circuits are now split.

In advancing its argument, Fuel misrepresents the Second Circuit's decision. The Second Circuit did not "refuse[] to apply any of this Court's post-*Metromedia* cases." Cert Pet. 14. Nor did it hold that "*Metromedia* forecloses petitioner's First Amendment challenge as a matter of law." Cert Pet. 14. The Second Circuit, as the Ninth Circuit also did in *Metro Lights*, undertook an exhaustive analysis of both *Metromedia* and the *Greater New Orleans* line of cases and found that these cases dictate the same result as *Metromedia*. App. A-23-28.

This Court declined to revisit *Metromedia*, when it denied certiorari in *Metro Lights* on December 14, 2009. There is nothing new or novel in this instant case. Rather, the Second Circuit applied this Court's holding in *Metromedia* in a manner wholly consistent with the Ninth Circuit's application in *Metro Lights*. Consequently, there continues to be no reason to revisit *Metromedia*.

B. There is no conflict among the circuits on the evidence required to support a commercial speech restriction.

Next, Fuel attempts to invent a conflict among the circuits with respect to the "quantum of evidence that is required for the government to justify the suppression of commercial speech." Cert. Pet 26-29. Fuel argues that the Second Circuit departed from other circuits when it deferred to the City's judgment in the placement of outdoor advertising. While couched in slightly different terms, Metro Lights presented a similar argument in its petition for certiorari.

Fuel cites three cases in which it claims a "significant quantum of concrete evidence is required for the government to meet its burden under *Central Hudson*." Cert. Pet. 27 (citing *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007); *El Dia, Inc. v. Puerto Rico Department of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005); *Mason v. Florida Bar*, 208 F.3d 952, 957-58 (11th Cir. 2000)). Fuel's reliance on these cases is misplaced.

In each of these three cases, a content-based commercial speech restriction was struck down because the government failed to provide *any* evidence - statistical, anecdotal, or otherwise - to suggest that the speech at issue posed any threat of concrete harm to the governmental interest the restrictions were designed to protect. *Pagan*, 492 F.3d at 772; *El Dia*, 413 F.3d at 116; *Mason*, 208 F.3d at 957-58. Thus the requisite connection between the speech and the harm was missing, as well as any evidence that the commercial speech restriction would substantially alleviate the harm. This is not the case here.

The Second Circuit did not simply defer to the City's judgment in the absence of any evidence of a "concrete harm," as Fuel asserts. The record contains ample evidence that there has been a dramatic increase of illegal advertising signs throughout the City on and adjacent to buildings. Courts have accepted and endorsed the common legislative judgment that the proliferation of advertising signs constitutes a visual assault on citizens and negatively impacts aesthetics. *See Metromedia*, 453 U.S. at 507-08, 510; *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Young v. American*

Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion) ("[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect").

Moreover, the record demonstrates that the City's zoning regulations will significantly alleviate the negative impact on aesthetics and neighborhood preservation by removing the offending signs from the impacted areas. Consequently, the City met its burden of demonstrating both a concrete harm and that the commercial speech restriction will alleviate the harm to a material degree.

In addition, ample evidence was introduced supporting the City's position that the limited and controlled advertising permitted on street furniture under its contract with Cemusa does not create the same aesthetic harm as uncontrolled advertising on buildings. Buildings define the character and uniqueness of a neighborhood and determine the type of zoning district – commercial, manufacturing, residential etc. In contrast, streets and sidewalks are in large part uniform throughout the City.

Douglas Woodward, the City's expert, explained that the proliferation of advertising signs on buildings directly and negatively impacts aesthetics and neighborhood character. Meanwhile, the new, uniform, well-maintained street furniture aesthetically improves the overall streetscape, even though limited and controlled advertising is permitted on the street furniture. While Fuel disputes Woodward's conclusions and

maligns his qualifications, he has over twenty years of experience as a planner and urban designer. Moreover, nothing he states is outside the realm of common knowledge. Anyone can walk down sidewalks in the City's many and varied neighborhoods and reach the same conclusion.

Thus the Second Circuit properly credited the reasonable legislative judgment that allowing a limited amount of advertising on street furniture located on the sidewalk and, in most instances, near the curb, would not negatively impact aesthetics and, that any minimal aesthetic impact as a result of the limited advertising is far outweighed by the new street furniture which dramatically improves the overall streetscape. App. A-28.

The Second Circuit's approach is identical to the approach taken in the cases cited by Fuel. Consequently, no conflict exists among the circuits.

Equally without merit is Fuel's suggestion that the City's economic motive for allowing limited advertising on street furniture was not fully explored and that the City, in essence, sold an exemption to a speech restriction to generate revenue. Although the City's sign restrictions date back to the 1940s, they never applied to City sidewalks. Consequently, Fuel's assertion that the City intentionally carved out an exception for street furniture located on City sidewalks solely for revenue raising is refuted by the actual facts.

Fuel's quotation from this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), is misplaced. Yelling fire in a

crowded movie theatre identically threatens public safety whether you have contributed $100 to the state treasury or not. However, the same analysis would not apply if the $100 contribution allowed you to yell fire in an empty movie theatre, something that was never prohibited in the first place, the more apt comparison. The record demonstrates that the advertising on street furniture does not negatively impact aesthetics or neighborhood preservation. Consequently, unlike Justice Scalia's example above, street furniture advertising is not an exception to the harm the zoning regulations were designed to address.

Finally, the amici adds their own spin to the economic argument, analogizing the City's regulations to case law where courts, on due process grounds, have kept adjudicatory bodies from deciding matters in which they have a financial stake. (Brief of Amici Curiae Atlantic Outdoor Advertising, Inc. and Willow Media, LLC, at 5-7).

As a preliminary matter, no due process claims were raised below. However, even if this issue was preserved for review, the amicus brief does not present a ground to revisit *Metromedia*. The due process bias cases cited by amici have no application to the City's zoning regulations, a pure legislative act. To uphold the legislative choice, a court need only find some "reasonably conceivable state of facts that could provide a rational basis" for the legislative action. *Heller v. Doe*, 509 U.S. 312, 320 (1993). This was certainly established here.

This Court had the opportunity to consider this identical argument when it was raised by these

same amici in the amicus brief they submitted in support of Metro Light's petition for a writ of certiorari. Nothing in this area of the law has evolved in the past nine months that would warrant this Court's review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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No. 10-79

In the

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METRO FUEL L.L.C.,

Petitioner

– v. –

CITY OF NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I. THE OPEN CONFLICT AMONG THE CIRCUITS REGARDING THE PRECEDENTIAL EFFECT OF *METROMEDIA* WARRANTS THIS COURT'S ATTENTION

The City does not deny that there is pervasive uncertainty in the lower courts over the meaning and scope of this Court's fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) Instead, the City claims that this widespread confusion is without prejudice, at least in this case, because the Second Circuit "undertook an exhaustive analysis of both *Metromedia* and the *Greater New Orleans* line of cases." Opp. 6 That is not true.

In its opinion, the Second Circuit concluded that *Metromedia* "is controlling" before it even *mentioned* the *Greater New Orleans* line of underinclusiveness cases. App. A-19 The court then brushed those cases aside, citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), for the proposition that it was constrained to "follow the case which directly controls," and concluding that "[a]s already discussed, the Supreme Court's decision in *Metromedia* is most directly on point." App. A-23-24. The Second Circuit found it "particularly significant" that, as the court read *Metromedia*, "the law of billboards" is "a law unto itself." App A-24 (quoting *Metromedia*, 453 U.S. at 501) In other words, outdoor advertising restrictions are not subject to the same scrutiny that applies to other commercial media because outdoor advertising is a "distinct First Amendment . . context." *Id.* There is no question that the Second Circuit believed its hands were tied

by *Metromedia*, and that this belief tainted its analysis of this Court's post-*Metromedia* underinclusiveness cases.

The Ninth Circuit's treatment of *Metromedia* in *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), was, if anything, even more extreme. That court read *Metromedia* to require it do "exude[] deference" to municipalities' outdoor advertising restrictions. *Id.* at 910. Unlike the Second Circuit, the Ninth Circuit acknowledged the "tension" between *Metromedia* and this Court's subsequent underinclusiveness cases *Id.* at 908. But like the Second Circuit, the Ninth Circuit nonetheless held that it was "bound to follow the Supreme Court precedent most directly on point," which it concluded was *Metromedia Id.* at 911 ("*Metromedia* is such a case, and it controls the outcome.").

This case readily demonstrates the danger of allowing the pervasive confusion about the binding effect of *Metromedia* to fester. If the scheme at issue in this case is constitutional, then the First Amendment imposes no limits on the ability of municipalities seeking to generate revenue to auction off to the highest bidder exemptions to commercial speech restrictions. As the City would have it, it could ban commercial leafleting (for the ostensible purpose of minimizing litter) but nonetheless sell the exclusive right to distribute commercial leaflets on the City's sidewalks. It could ban tobacco advertising in close proximity to schools (for the ostensible purpose of combating teenage smoking) but exempt tobacco companies willing to fund after-school recreational programs. The federal

government could prohibit automated commercial telephone solicitations (for the ostensible purpose of insulating people from unwanted commercial intrusions in their homes) but nonetheless engage in the widespread use of automated telephone solicitations to market automobiles made by General Motors. That obviously is not the law.

II. THE DECISION BELOW EXACERBATES A PALPABLE CIRCUIT CONFLICT REGARDING THE QUANTUM OF EVIDENCE REQUIRED TO JUSTIFY THE SUPPRESSION OF COMMERCIAL SPEECH

The City does not deny that the First, Sixth, and Eleventh Circuits have held that the government must adduce a significant quantum of concrete evidence in order to meet its burden of justifying the suppression of commercial speech. *Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007); *El Dia v Puerto Rico Dep't of Consumer Affairs*, 413 F.3d 110, 115-16 (1st Cir. 2005); *Mason v. Florida Bar*, 208 F.3d 952, 956-58 (11th Cir. 2000).

Instead, the City contends that the Second Circuit's opinion below does not conflict with these cases because, according to the City, the record contains "ample" evidence supporting its decision to exempt its franchisee's street furniture advertising signs from the restrictions that apply to everyone else Opp 7 That is false The record contains zero such evidence, which is why this case conflicts so squarely with *Pagan*, *El Dia*, and *Mason*.

To be sure, the record is consistent with the City's uncontroversial assertion that "the proliferation of advertising signs . . . impacts aesthetics." Opp. 7. But that is just a straw man. The question in this case is not whether advertising signs impact aesthetics. Of course they do. The question is whether the City has demonstrated a sufficient basis for treating petitioner's advertising signs so *differently* than it treats its franchisee's identical signs. It is undisputed that, apart from Mr. Woodward's "expert" opinion, the record contains no evidence whatsoever supporting the City's after-the-fact, litigation-minted theory that street furniture advertising signs are, by virtue of their placement on the sidewalk, incapable of impacting aesthetics.

The City also claims that the record contains "ample evidence" justifying its tolerance of "limited and controlled" advertising signs on street furniture despite its near-total prohibition of "uncontrolled" signage on adjacent private property. Opp. 8. That also is false. Indeed, the only evidence bearing on this issue – the 1996 report issued by the New York City Planning Commission following its study of the street furniture advertising proposal – expressly confirms that the City believed street furniture ads *would* have a significant adverse impact on aesthetics and neighborhood character, but that the negative aesthetic impact was tolerable in light of the City's desire to generate *revenue*. This record contains no evidence supporting the "controlled" versus "uncontrolled" construct that the City now conjures. Far from the product of any "reasonable legislative judgment," Opp. 9, the record confirms

that the City gave this supposed justification no consideration at all when it devised the scheme at issue.

Moreover, even if the "controlled" versus "uncontrolled" distinction had been considered by the policymakers who devised this scheme, it is a false dichotomy. The consequence of petitioner's underinclusiveness argument is *not* that it has the *unlimited* right to place advertising signs wherever it pleases. To the contrary, petitioner recognizes the City's substantial authority to impose reasonable time, place, and manner restrictions on advertising signs – such as, for example, size, height, spacing, illumination, and/or geographic restrictions – so long as the City deems such restrictions sufficiently important to apply to its revenue-generating franchisees. If the City wishes to ban advertising signs in residential zoning districts, it need only remove its street furniture signs from the many residential districts in which they have been placed. Just because the City's willingness to look the other way for the right price renders its scheme unconstitutional in this case does not mean that all signage on private property must be "uncontrolled."

Attempting to mask the discriminatory nature of its scheme, the City claims that it has not actually exempted its franchisee's street furniture signs because its advertising sign restrictions have "never applied to the City sidewalks." Opp. 9. That also is false. The City's advertising sign restrictions apply broadly to all "structures" and "open spaces" within a given zoning district. N.Y. Zoning Resolution § 11-01. Structures in public parks are expressly exempted, but structures on sidewalks are not. *Id.* § 11-13.

Indeed, the New York City Zoning Resolution contains numerous provisions that expressly restrict the use of the sidewalks, including, for example, provisions governing sidewalk cafes (*id.* § 14-10 et seq.) and the planting of sidewalk trees (*id.* § 95-10).[1]

For this reason, the City cannot persuasively distinguish Justice Scalia's fire-shouting hypothetical in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Substituting the facts of this case into Justice Scalia's hypothetical, it would read as follows:

> While [advertising sign restrictions] can be a core exercise of the State's police power to protect [aesthetics and neighborhood character], and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition [*i.e.*, granting an exemption in order to raise revenue] alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban

Id. at 837.

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[1] In any event, the City plainly could subject its street furniture franchisee to the requirements of the Zoning Resolution as a matter of contract if it chose to do so. Indeed, section 4.4.2 of the street furniture franchise agreement expressly requires Cemusa to comply with the City's electronic media restrictions that govern the property adjacent to any given street furniture structure. The City certainly could have required, as a matter of contract, that street furniture signs comply with *all* of the advertising restrictions that apply to adjacent property. But because doing so would all but wipe out Cemusa's entire inventory, the City chose not to require Cemusa to follow the rules that apply to everyone else.

The City urges that its scheme is merely akin to selling the right to yell fire in an *empty* movie theater because sidewalk advertising "was never prohibited in the first place" and "does not negatively impact aesthetics or neighborhood preservation. Opp 10. The first assertion is a legal fiction because, as demonstrated above, the Zoning Resolution does not expressly or impliedly exempt the City's sidewalks from all land use restrictions And the City tacitly acknowledges that the record contains no support for the second assertion by urging that it is "common knowledge" that street furniture advertising signs have no aesthetic impact on the streetscape. Opp. 9

The City's "common knowledge" argument is telling because it is the language of rational basis review. At bottom, that is the standard that both the Second and Ninth Circuits applied, in violation of more than thirty years of case law establishing that commercial speech restrictions are subject to substantial, searching scrutiny. *City of Cincinnati v. Discovery Network*, 507 U S 410, 417 n.13 (1993) (reaffirming this Court's "reject[ion]" of "mere rational-basis review" in commercial speech cases)

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 10-79

In the

Supreme Court of the United States

METRO FUEL L.L.C.,

Petitioner,

-- v. --

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

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Interest of *Amici Curiae*[1]

Amici Atlantic Outdoor Advertising Inc. and Willow Media, LLC are engaged in the business of placing and maintaining commercial signs on private property. The signs provide consumers with accurate information about their economic options. Despite the conceded importance of the flow of commercial information to a free market economy, *amici* operate in a highly unstable legal environment, reflecting massive confusion over the legal effect of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In recent years, moreover, the regulatory climate affecting the free flow of commercial information in many urban settings has been further confused by an increasing tendency on the part of municipal governments to view commercial signage as an important source of municipal revenue. For example, in this case, the City of New York has entered into an exclusive 20 year contract with Cemusa involving the payment to New York City of more than $1 billion in royalties authorizing Cemusa to place and maintain "Street Furniture," an Orwellian name for commercial signage, on bus shelters and other forms of public property. In order to enhance the economic value of Cemusa's exclusive

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[1] This brief *amicus curiae* in support of petitioner's application is filed in accordance with Rule 37.2(a). Written consents by all parties to the filing of this brief have been lodged with the Clerk of the Court. Petitioner's application for a writ of *certiorari* was filed on July 6, 2010 and docketed on July 14, 2010. Notice of intent to file this brief was provided to the parties on July 28, 2010. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici curiae* make a monetary contribution to the preparation or submission of this brief.

right to sell advertising on bus shelters and other public property (and to enhance the royalties payable to New York City), New York has invoked its ill-defined regulatory powers under *Metromedia* to ban virtually identical commercial signs on private property that would compete with Cemusa's monopoly.

The stark issue raised by this appeal is whether New York may seek to maximize its economic return on the flow of commercial speech on public property by censoring virtually identical competing commercial speech on private property.

At a minimum, *amici* believe that the deferential standard of review announced by this Court in *Metromedia* and *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), does not govern in commercial speech settings where the neutrality of a city's regulatory process is called into question by massive economic self-interest. In view of the importance of the free flow of commercial speech, *amici* urge the Court to grant petitioner's application for a writ of *certiorari* in order to: (1) clarify the power of municipalities to regulate off-site commercial signage under *Metromedia*; and (2) limit the power of municipal governments to favor one commercial speaker by censoring the competition in return for a cut of the profits.

Statement of the Case

The narrative facts of this case are fully set forth in petitioner's application for a writ of *certiorari*, and in the thorough opinions of the lower courts annexed to petitioner's application. It is, however, worth emphasizing that the New York City restrictions on commercial signage before the Court are blatantly and discriminatorily under-inclusive. In the ostensible name of aesthetics and traffic safety, New York City has banned off-site commercial signage on private property abutting the public streets, while charging a hefty fee to license a monopoly speaker to display essentially identical commercial signs on public property. The blatantly discriminatory nature of the New York City regulation is neither inadvertent nor the result of a flawed regulatory process. It reflects an agreement between the City and its hand-picked franchisee to maximize the economic value of the franchisee's commercial signs at the expense of competing speakers in the private sector.

ARGUMENT

THE ISSUES POSED BY PETITIONER WARRANT SUPREME COURT REVIEW

A.

Clarification of *Metromedia* is Long-Overdue

In the 34 years since this Court formally recognized that commercial speech is protected by

the First Amendment, the Court has repeatedly stressed the importance to a market economy of the free flow of accurate commercial information. *Virginia Pharmacy Board of Examiners v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Most importantly in the context of this case, the Court has repeatedly recognized that, under the four-part test enunciated in *Central Hudson*, government's assertion of a constitutionally sufficient interest in censoring the free flow of commercial information is undercut when the regulation fails, in fact, to advance the asserted governmental interest, or is more extensive than reasonably necessary. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1983); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

Metromedia sought to establish ground rules governing municipal regulation of off-site commercial signage that would harmonize the importance of the free flow of commercial information with concerns over aesthetics and traffic safety. Unfortunately, the case, decided almost 30 years ago during the infancy

of the commercial speech doctrine, failed to generate either a majority opinion, or a coherent rationale. The result has been almost three decades of chaos in the lower courts concerning the legal status of off-site commercial signage. The wide disparity in the lower courts' understanding of *Metromedia* sounds a plea for additional guidance that should be heeded by the Court.

B.

Economically Self-Interested Regulation of Commercial Speech Should Trigger the Most Exacting Judicial Scrutiny

This Court has recognized that, ordinarily, when government acts as a *neutral* regulator, its regulatory judgments are entitled to substantial judicial deference. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The Court has further recognized that when government acts as a *neutral* regulator of the flow of commercial information, a degree of deference should be accorded to legitimate exercises of regulatory authority. *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). When, however, as here, government acquires a massive and direct economic stake in censoring otherwise protected commercial speech, government abdicates all pretence of regulatory neutrality. Such a financially self-interested exercise in censorship should be subjected to the most exacting level of judicial scrutiny.

New York City may well have the power to enter into an exclusive contract for commercial signage on its bus shelters. But, in the absence of the most compelling justification, New York City may not act to maximize the economic value of the bus shelter contract by using its regulatory power to stamp out competing commercial speakers operating on nearby private property. The First Amendment is not for sale, even in a commercial context.

This Court has long recognized the distinction between a "market regulator" and a "market participant." Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), with *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In the Commerce Clause area, the distinction has tended to increase the power of local government by permitting a "market participant" to behave in ways that would be denied to a "market regulator." This case is the obverse of the Commerce Clause "market participant" cases. Whatever power New York City might enjoy as a neutral "market regulator" under *Metromedia*, once New York becomes a "market participant" by acquiring a massive economic stake in the outcome, New York may not use its regulatory powers to censor competing speakers.

It is, of course, an axiom that no person should be a judge in his or her own case. This principle applies to commercial speech regulators. This Court has ruled that the Due Process Clause forbids a judge or an administrative official from presiding over an adjudicatory proceeding when the adjudicator has a substantial financial interest in the outcome. E.g.,

Tumey v. Ohio, 273 U.S. 510 (1927) (criminal proceeding); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (criminal proceeding); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (civil proceeding).[2]

When, as here, economic self interest is transposed from an adjudicatory to a regulatory setting, the economically self-interested nature of the regulator should trigger searching judicial inquiry into the adequacy of the purported regulatory justifications. Moreover, when, as here, the economically self-interested regulation discriminates between and among identically-situated commercial speakers, the regulatory decision should be subject to the most exacting judicial scrutiny.

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[2] All nine Justices in *Caperton v. A.H. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2252 (2009), agreed that a direct financial interest in the outcome of an adjudication would preclude a financially interested judge from presiding.

CONCLUSION

For the above-stated reasons, a writ of *certiorari* should issue to review the decision of the Second Circuit panel below.

Dated: August 13, 2010
New York, New York

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